(26,504)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 446.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

a In the Supreme Court of the State of Colorado.

Be it remembered, That on the twenty-eighth day of August, A. D. 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Colorado, a certain transcript of record, of which the following is a true copy, to-wit:

b District Court, City and County of Denver, Second Judicial District.

STATE OF COLORADO,
City and County of Denver, ss:

Pleas in the District Court of the City and County of Denver, State of Colorado, in the Second Division thereof, before the Hon. John H. Denison, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said County, on the second Tuesday (it being the Eighth day) of April, A. D. One Thousand Nine Hundred Thirteen.

Present:

Hon. John H. Denison, one of the Judges of the District Court. John A. Rush, Esq., District Attorney of said District. D. M. Sullivan, Esq., Sheriff of said County. J. Sherman Brown, Esq., Clerk of said Court.

c STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 2.

No. 55316.

HENRY FARNCOMB et al., Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants.

Notice.

To the City Attorney:

A copy of the statement of record on error prepared by the plaintiffs is herewith served upon you, and you are hereby notified that the same will be submitted to the court in accordance with the rules

of practice and procedure in civil cases adopted by the Supreme Court, effective September 14, 1914.

Yours, etc.,

OMAR E. GARWOOD,
BERT MARTIN,
T. J. O'DONNELL,
Attorneys for Plaintiffs.

Received a copy of the foregoing notice and the statement of record on error therein mentioned, this 6th day of August, A. D. 1915.

J. A. MARSH,
GEO. Q. RICHMOND,
Attorneys for Defendant.

1 STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 2.

No. 55316.

HENRY FARNCOMB et al., Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants.

Record on Error.

On, to-wit, April 10, 1913, the original complaint herein was filed, naming Henry Farncomb, Emma Donahue, Henry Lorie and M. N. Campbell, "for and on behalf of themselves, and all other taxpayers of the City and County of Denver similarly situated and interested," as plaintiffs, and "The City and County of Denver, a municipal Corporation, Henry J. Arnold, as Mayor of the City and County of Denver, John S. Macbeth, W. W. Porter, W. N. Downing, E. W. Robinson and Thomas B. Long, as members of the Park Commission of the City and County of Denver, John S. Macbeth, as President of the Park Commission, James F. Markey, as Auditor of the City and County of Denver, Otto Thum, as Clerk of the City and County of Denver, and Clair J. Pitcher, as Assessor of the City and County of Denver," as defendants, said complaint, omitting caption being in words and figures as follows, to-wit:

2 *Complaint.*

Come now the plaintiffs above named, by their attorneys, Omar E. Garwood and Bert Martin,, for and on behalf of themselves and on behalf of all other taxpayers of the City and County of Denver,

who are similarly situated and interested and complaining of the defendants, they allege:

1. That the defendant, the City and County of Denver, is a municipal corporation, existing under and by virtue of the twentieth amendment to the constitu-ion of the State of Colorado.

2. That the said City and County of Denver, pursuant to said twentieth amendment to the constitution of the State of Colorado, heretofore adopted a charter, which divided the City and County of Denver into four Park Districts, said division being made by article 323 of said charter, which is in words and figures as follows, to-wit:

"Section 323. The City and County is hereby divided into four park districts, consisting respectively of the following territory:

"The Mountain Park District, all that part of the city and county lying east of McKinley Avenue, formerly Colorado Boulevard.

"The South Denver Pary District, all that part of the city and county lying south and east of Cherry Creek and easterly from the Platte River.

"The Highland Park District, all that part of the city and county lying north and west of a line beginning at the southerly boundary lines of the city and county at its intersection with the Platte River following the course of the Platte River in a northerly direction to the intersection with Cherry Creek, thence southeasterly along
3 Cherry Creek to its intersection with Larimer Street, thence along Larimer Street to its intersection with Downing Avenue, thence along Downing Avenue to Thirty-eighth Street, along Thirty eighth Street to the Platte River, following the course of the Platte River to its intersection with the northerly boundary line of the city and conuty.

"The East Denver Park District, all the remaining territory of the city and county.

3. That the defendants, John S. Macbeth, W. W. Porter, W. H. Downing, E. W. Robinson and Thomas B. Long are members of the Park Commission appointed under the provisions of the charter of the City and County of Denver, by the Mayor of the City and County of Denver.

4. That the defendant, Henry J. Arnold, is the duly elected, qualified and acting Mayor of the City and County of Denver; that the defendant, Allison Stocker, is the duly elected, qualified and acting Treasurer of the City and County of Denver; that the defendant, James F. Markey, is the duly elected, qualified and acting Auditor of the City and County of Denver; that the defendant, Otto Thum, is the duly elected, qualified and acting City Clerk of the City and County of Denver; that the defendant Clair J. Pitcher, is the duly elected, qualified and acting Assessor of the City and County of Denver.

5. That the plaintiff, Henry Farncomb, is and for a long time has been the owner of Lots fourteen to eighteen inclusive, Block ninety, Case and Eberts Addition, and also of lots seventeen and eighteen, Block one hundred Sixty-six, South Division of Capitol Hill, all in the City and County of Denver: that the plaintiff, Emma Donahue, is and for a long time past has been the

4 owner of lots twenty-three and twenty-four, Block one hundred fifty-three, Stiles Addition to the City and County of Denver: that the plaintiff, Henry Lorie, is and for a long time past has been the owner of lots seventeen to twenty-one inclusive Block seventy-three Case and Eberts Addition to the City and County of Denver: that the plaintiff, M. N. Campbell, is and for a long time past has been the owner of lot three and fifteen feet of Lot two, Block three, Kountze Addition to the City and County of Denver: that each and all of the above described parcels of property are situate within the boundaries of the aforementioned East Denver Park District and that all of said property, together with all other property in said East Denver park district has been subjected to a pretended assessment for the principal and interest of what is known as the Civic Center bonds, which have been issued by the *the* defendant, the City and County of Denver, for the purpose and acquisition by the City and County of Denver of what is commonly known as the Civic Center, as hereinafter set forth.

6. That during the year 1909 the above named Park Commission, together with one Robert W. Speer, the then Mayor of the City and County of Denver, connived, confederated and conspired together for the purpose of fraudulently burdening the taxpayers and property owners in said East Denver park district with the expense of acquiring the necessary real estate for the establishment of a proposed Civic Center for the City and County of Denver, under the guise of a pretended park and in pursuance of said conspiracy

5 and confederation they did cause to be published in certain newspapers in the City and County of Denver, in the month of August, 1909, a pretended notice to all of the property owners in the said East Denver Park District of said proposed purchase, together with a pretended notice that all of the property owners in the said East Denver park district would be assessed for the purchase of said property and the said Park Commission did knowingly and fraudulently give a pretended notice that there were 65,000 lots in said Denver *Denver* Park district, and that thereafter when the property owners in said East Denver park district protested against the said proposed improvement, their being included in their said protest some 25,000 lots in said East Denver park district, the said Park Commission did fraudulently and knowingly and for the purpose of defeating said protest, count and include within the limits of said park district all federal property belonging to the United States Government, all cemeteries, School buildings, and other real property belonging to the City and County of Denver, whereupon they announced that the number of lots included in said East Denver park district for the purpose of said assessment would and did amount to 82,000 lots, when in truth and in fact it was no more than 65,000 lots and thereafter the said Park Commission and the said Robert W. Speer, as Mayor of the City and County of Denver, with other city officials under his jurisdiction, approached certain property owners who had protested against the said proposed civic center and whose protests

6 had been acknowledged before a Notary Public and which protests were in proper legal form, and fraudulently made

certain offers to said property owners to the effect that if said property owners would withdraw their said protests, that they, the said Robert W. Speer, and other city officials, under his jurisdiction, would procure an advantageous sale for the property belonging to said property owners and at a price greatly in excess of the market value of said property: And to other property owners the said Robert W. Speer did promise municipal employment if the said property owners would withdraw their protests and said promises made by the said Robert W. Speer and other city officials under his jurisdiction were in violation of the oath of office of said Robert W. Speer and were made in furtherance of the conspiracy hereinabove described, and for the purpose of fraudulently promoting the said civic center scheme contrary to the wishes of a majority of the property owners in said East Denver park district, and that by reason of the said fraud and deceit practiced upon them the said Robert W. Speer and his associates did induce a large number of said property owners to attempt to withdraw their protests, leaving only 21,000 lots included within said protest, but the plaintiff's aver that even with only 21,000 lots included within said protest, said protest was sufficient under the requirements of the charter of the city and county of Denver to defeat the establishment and acquirement of said Civic Center project.

7 7. Notwithstanding this, the said Park Commission and the said Mayor were determined to establish said Civic Center at the expense of the property owners of the said East Denver Park District regardless of said protest and to that end the said Mayor did appropriate certain funds of the City and County of Denver, through the said Park Commission, for the purpose of influencing the action of property owners in said East Denver park district and for the purpose of keeping and maintaining headquarters and in furnishing money for a hired band, one of the said items being represented by a bill for the sum of $147.00 paid out of the Park Fund, being voucher No. 11748, paid by warrant No. 32095.

8. That in attempting to decide the question of the establishment of a civic center under the guise of a proposed park, the Park Commission of the City and County of Denver pretended to act under certain sections of the charter of the City and County of Denver, which are void and of no force and effect; that the Charter of the City and County of Denver makes no provision whatever for withdrawals of protests in proceedings for the acquirement of property for park purposes, and that such protests when once made can never be withdrawn by any person,

9. That the Section of said charter, being No. 327, which refers to protests against the purchase of property for park purposes is as follows, to-wit:

8 "The Commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purposes: but, if within the time above specified, a remonstrance shall be filed with the secretary of said commission, subscribed by the owners of twenty five per

cent in area of the real estate which is to be assessed, then the proposed purchase or condemnation shall not be made, and the proceedings shall not be renewed for one year thereafter; and the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required numbers of owners aforesaid, shall be conclusive in every court or other tribunal."

10. That plaintiffs aver that all acts of the defendants, with reference to the establishment and acquirement of the property for the said proposed Civic Center under the guise of a Park insofar as the same are based upon the withdrawals of protests against said improvement are null and void and contrary to the constitution of the United States and the constitution of the State of Colorado.

11. That plaintiffs did not and could not have discovered said fraud above described until a short time prior to the commencement of this action.

12. That afterwards and on or about the 23rd day of March, 1910, the Board of Aldermen and the Board of Supervisors and the Mayor of the City and County of Denver purported to make a finding based upon the said fraudulent report of the Park Commission of the City and County of Denver *the* the effect that there were not sufficient protests made against the proposed Civic Center improvement in said East Denver park district to defeat the same, said purported finding being made by Ordinance No. 47 of the series of 1910.

9 13. That the said Board of Aldermen, Board of Supervisors and the Mayor of the City and County of Denver made no investigation whatever as to the truth of the matters containing in the finding of the Park Commission upon which ordinance was based, and that all of the findings attempted to be made in said ordinance number 47, of the series of 1910, were and are void and of no effect.

14. That on or about the 7th day of October, 1912, the Clerk of the City and County of Denver caused to be published in certain newspapers in the City and County of Denver a notice that the Board of Supervisors would pretend to sit as a Board of Equalization for the purpose of hearing protests against the pretended assessment of property in said East Denver park district for the cost of said civic center improvement, and on the 7th day of December, 1912, the said Board of Supervisors undertook to sit as a Board of Equalization for the purpose of hearing said protests but that at said hearing the said pretended Board of Equalization refused to hear any testimony in reference to fraud in regard to the establishment of said proposed civic center, or in regard to the assessment of property in the said East Denver Park district and the said board of Supervisors pretending to sit as a Board of Equalization wrongfully held and ruled that if there was fraud in any of the proceedings for the establishment of said Civic Center, that the Board of Supervisors was powerless to hear evidence with reference thereto, or to grant any relief and the defendant, W. W. Porter, then a member of said Park Commis-

10 sion, did testify before said Board of Supervisors then pretending to act as a Board of Equalization that the various

assessments against the lots in the said East Denver Park district had not been levied in accordance with the special benefits supposed to accrue thereto but in the following manner and for the following reasons, to-wit: that the principal purpose for which said Civic center was inaugurated and projected was that all of the property located in the present business district of the City and County of Denver would be greatly enhanced in value because the said Civic Center would prevent the establishment of business enterprises south of said Civic Center and in which direction the retail business of Denver was at that time rapidly moving, and that he, the said Porter, and other members of the Park Commission, prior to the projecting of said Civic Center, had held consultations with leading business men of the City and County of Denver for the purpose of bringing about a plan to intercept the growth of business enterprises south of said proposed Civic Center and that the said W. W. Porter further stated that the chief element considered by the said Park Commission in levying the assessments against the various parcels of property in the said East Denver park district was that a certain sum of money had to be raised for the acquirement of the Civic Center and no regard was had whatsoever for the special benefits which would accrue to the various parcels of property in said East Denver park district through the establishment of said Civic Center nor was any regard whatsoever had to the special benefits which would accrue to a large portion of the real estate in the City and County of Denver, situate in close proximity to said Civic Center but not included within said East Denver park district.

11 15. That thereafter testimony was introduced before said Board of Supervisors by one John S. Flower, showing gross unequal, inequitable and unjust assessments against parcels of property in the East Denver park district on account of said Civic Center, particularly enumerating the lots and blocks on which said inequitable and unjust assessments had been levied by the said park commission, and that then and there each and every member of the said Board of Supervisors openly declared that the said assessments as shown by the said John S. Flower were unequal, inequitable and unjust and that numerous other lots in said district were shown to be unequally, inequitably and unjustly assessed to such an extent that the said Board of Supervisors declared that it would take up so much of their time to properly equalize said assessments that they could not afford to do so as they were not receiving sufficient salary for such labor and thereupon the said assessments upon the various parcels of property in said East Denver park district were referred back to said Park Commission.

16. That the said Park Commission, upon receiving said assessments for the purpose of re-assessing the same, according to benefits, merely pretended to do so and proceeded to make a slight change in only one assessment of one particular individual and then referred such assessments back to the said Board of Supervisors and the said Board of Supervisors again pretending to act as a Board of Equalization, proceeded to pass a certain ordinance known as ordinance No. 3, of the series of 1913, purporting to levy each and all of said

assessments so returned by said Park Commission against all
12 of the said acts and doings on the part of said Park Commission and on the part of the said Board of Supervisors thus pretending to act as a Board of Equalization, were and are contrary to the constitution of the State of Colorado, and were such as to constitute a taking of property without due process of law and contrary to the constitution of the United States of America.

17. That the said pretended assessments were levied in an arbitrary and irregular manner and without regard to any system in relation to value or in reference to benefits received by property situate within said East Denver park district on account of said proposed Civic Center.

18. That the said Park Commission and the said Robert W. Speer, as Mayor of the City and County of Denver, previous to the announcement to the public of the proposed Civic Center gave out privately to those who were in favor with the Administration secret information that the Civic Center was to be purchased and established and gave to said persons a description of the proposed boundaries thereof and that persons connected with the Administration went to the owners of land proposed to be purchased in said East Denver park district and secured from them options on said property within said boundaries and speculated in the same to their great profit and to the detriment of property owners within the East Denver park district.

19. That the said Park Commission, with the approval of the said Robert W. Speer as Mayor of the City and County of Denver, in pursuance of their plan to force the said Civic Center upon
13 the taxpayers of the East Denver park district, acquired the necessary real estate for the said Civic Center of the alleged value of $2,900,000.00, and thereafter, the said park commission, with the approval of the said mayor, issued bonds of the City and County of Denver to the amount of $2,900,000.00, said bonds being for a period of fifteen years and bearing interest at the rate of 5½%, and that all of the acts of the said park commission and the mayor in undertaking to establish said Civic Center at the expense of the taxpayers of the East Denver park district, and to issue bonds therefor, were unauthorized, illegal, void and of no effect.

20. That unless restrained by this Honorable Court the payment of the principal and interest on said bonds will be made and charged upon all of the property situate in the said East Denver park district.

21. That no proposal of the said issue of said bonds was *never* submitted to the vote of the people of the City and County of Denver, or the taxpayers thereof, and that neither the qualified electors of the City and County of Denver nor the qualified electors of the East Denver park district have ever had any opportunity whatsoever to vote upon the said issue of said bonds and by reason thereof, the Park Commission of the City and County of Denver and the Mayor of the City and County of Denver were wholly without jurisdiction or authority to issue said bonds without a vote of the qualified electors of the City and County of Denver, or the taxpayers within the said

East Denver park district and the attempted issue of said bonds is in violation of the constitution of the State of Colorado.

14 22. That all of the pretended assessments against the various parcels of property included in the said East Denver park district are greatly in excess of any profits that might accrue to said property by reason of the establishment of said Civic Center; that the jurisdiction of the Park Commission of the City and County of Denver is limited to parks, boulevards and park-ways; that the establishment and acquirement of said Civic Center under the guise of a park was and is a mere subterfuge; that the said Civic Center is not a park nor a boulevard, nor a park-way, but is simply a proposed beauty scheme, wholly outside of the jurisdiction of the Park Commission of the City and County of Denver, and that no authority whatsoever exists in the charter of the City and County of Denver, or under the laws of the State of Colorado for the establishment or acquirement by the City and County of Denver of lands for such a Civic Center and that all of the acts of the principal authorities of the City and County of Denver including the said Park Commission, for the acquirement and establishment of said Civic Center, were and are void and of no effect, and that the attempt of the said Park Commission to assess all property owners in the East Denver Park district for the expense of purchasing and acquiring lands for the said Civic Center were and are wholly without their jurisdiction and each and all of said assessments are null and void and of no force and effect in law.

23. That the charter of the City and County of Denver provides that the Board of Supervisors, when sitting as a Board of

15 Equalization, if they find that said assessments have not been properly levied, that they refer said matters back to the Park Commission, and that said Board of Supervisors does not sit as a Board of Equalization, and have no authority, except to refer matters back to another board, which has already acted upon said proposition. Said section being No. 300, Article 1, which reads as follows:

"Supervisors Hear Complaints—Council Assess Cost.

Section 300. At the meeting specified in said notice, or any adjournment thereof, the Board of Supervisors, sitting as a Board of Equalization, shall hear and determine all such complaints and objections, and may recommend to the Board of Public Works any modification of their apportionments; the Board of Public Works may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by Ordinance, assess the cost of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

24. That by the above charter provision, no power to grant relief is given to the Board of Supervisors, when sitting as a Board of Equalization, and said meeting of said Board of Supervisors, sitting

as a Board of Equalization, is a farce and a travesty on justice, and all of the acts of said body are void and illegal, and that said hearing by said Board of Supervisors, sitting as a Board of Equalization, is in violation of the constitution of the United States, and the legal rights of plaintiffs, and to their irreparable damage and injury.

25. That said proceedings on their face purport to be made by the municipal authorities under the charter of said City and County of Denver and pretend to make a legal and valid assessment; that by said alleged assessing ordinance liens and clouds are cast upon the property of these plaintiffs, and if injunctive relief is
16 not granted these plaintiffs will be without any remedy in the premises; that defendants assert that the said so-called assessments are liens and claims for the amounts respectively set forth in said pretended assessing ordinance against the said lots and lands of the so-called East Denver park district, and if unrestrained by this Court they will be a perpetual lien against the lots and lands of the respective plaintiffs in the respective amounts assessed against the respective lots, pieces and parcels of land above mentioned, belonging to the plaintiffs aforesaid, and that said defendants will attempt to collect said so-called assessments in the manner and form set forth in said charter and stated for the collection of special assessments, and the defendant treasurer threatens to, and will, in the Fall of 1913, advertise the respective lots, pieces and parcels of land above mentioned and more particularly belonging to these plaintiffs, for sale, and sell the name for the amount of the so-called special assessments unless the assessments are paid; that there is nothing due or owing from the plaintiffs herein or any of them on their said property and nothing due therefor on account of or for the proposed Civic Center and said proposed parks, and that the liens upon the respective titles of the plaintiffs by the alleged assessing ordinance in truth and in fact are illegal and void.

26. That if the sale is made under and by virtue of the laws of the State of Colorado, then unless the amounts of said assessments together with interest and penalties added thereto are paid, tax deeds will issue to the purchasers at said sale, which by the laws of the State of Colorado are made prima facie evidence of the regularity of the proceedings and doings in that behalf.

17 27. That the said plaintiffs are without any adequate legal remedy in the premises; that any remedy they might resort to, if any there might be, would be dilatory, inadequate, incomplete and uncertain, and would require a great multitude of suits and would not afford to plaintiffs that speedy remedy granted by Section 6 of the Bill of Rights of the Constitution of the State of Colorado.

28. That plaintiffs further allege that the said pretended assessment is no assessment at all but is clearly null and void and of no force and effect, and that the actions and things therein alleged to have been done by said officers of said municipality, or any of said officers, were not the acts of said officers, but simply the lawless, unauthorized and illegal acts and doings of the same as individuals and

plaintiffs claim and allege the fact to be that there is nothing due or owing legally, morally or otherwise from them or from any of their property in the City and County of Denver to the holders of the bonds of the East Denver park district, and that there never was a valid lien or claim against them, or any of them, and that said assessments are wholly illegal and void, and whatever there is due, if anything might be due, is so mixed up and confused with claims which are absolutely illegal, void and excessive, that it is impossible to determine the amount approximately or at all.

29. That the said proposed Civic Center is so general in its nature as not to be a local improvement, and that the entire City and County of Denver should be taxed, if any tax there should be, for said proposed Civic Center, and not the East Denver park district, which comprises but one of four districts within the City and County of Denver.

18 30. That the plaintiffs have no plain, adequate and simple remedy at law or otherwise in the premises.

Wherefore, plaintiffs pray for judgment against the said defendants, and each of them, and that a decree be given decreeing said assessments to be null and void; and in the meantime, that a writ of injunction be issued out of and under the seal of this Honorable Court, directed to said defendants and each of them, restraining and enjoining them from or in any manner enforcing or collecting said assessments or attempting to enforce said assessments, particularly insofar as the same relates to any of the lots or parcels of land belonging to these plaintiffs; that if this Court deem said bond issue is valid and should be paid by the City and County of Denver, that the assessor of City and County of Denver be ordered by this Court to assess all the real property in the City and County of Denver in such manner and for such amount as will pay the interest and provide for the paying of said bonds in the event that the City and County of Denver is held for the same; that the treasurer be restrained from advertising the sale of plaintiff's properties or any of them, or attempting to do so, and from clouding the title of the plaintiffs in any of the lots, places or parcels of land above mentioned, or from interfering or molesting the plaintiffs, or any of them, in the use and enjoyment of any of the properties until the further order of said court, and pending the final determination of the validity of said alleged assessments; that the cloud or lien of the said assessments be removed and the said assessments declared

19 and decreed null and void and of no force or effect as applied to these plaintiffs, or any of the property above mentioned; and the plaintiffs ask for such other and further relief as to this court may seem meet and proper.

OMAR E. GARWOOD,
BERT MARTIN,
Attorneys for Plaintiffs.

STATE OF COLORADO,
City and County of Denver, ss:

Henry Lorie, being first duly sworn upon his oath deposes and says that he is one of the plaintiffs in the above entitled cause; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, information and belief; and as to such matters as are stated upon information and belief, he believes them to be true.

HENRY LORIE.

Subscribed and sworn to before me this 10th day of April, A. D. 1913. My commission expires August 14, 1917.

[NOTARIAL SEAL.] JOHN VAN PIPER,
Notary Public.

20 Thereafter, and on, to-wit, May 4th, 1913, a general demurrer on the ground that the complaint failed to state facts sufficient to constitute a cause of action, was interposed by the defendants "and each of them."

On, to-wit, April 24, 1913, The Westminster Mortgage Company, a corporation, Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger, and I. Singers-Bigger filed their complaint and petition herein, joining as plaintiffs, and entering their appearance herein, and on said day served notice of such joining as plaintiffs, and entering their appearance herein, and on said day served notice of such joining as plaintiffs, together with a copy of their said complaint and petition, upon the defendants. Said petition and complaint, omitting caption, is in words and figures as follows, to-wit:

21 Now comes The Westminster Mortgage Company, a corporation, incorporated under the laws of the State of Colorado, and having its domicile at Denver, in said State, and Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger, and each for itself, himself, or herself, as the case may be, alleges and makes complaint:

That on account of the attempt of the said defendant, the City and County of Denver, and the said several officers thereof named in the complaint herein as defendants, acting or pretending to act as such officers, as in said complaint described, to levy and assess against the several properties of these complainants, hereinafter described and mentioned, the unjust, unauthorized, illegal and extortionate tax, under the guise of an assessment for special benefits, in the complaint herein, and hereafter referred to, they are severally interested in resisting the said attempt to levy and assess the said unjust, unauthorized, illegal and extortionate tax, under the guise of an assessment for special benefits, in the complaint herein, and hereinafter referred to, against their several and respective properties, hereinafter mentioned, and to that extent are in a similar situation with the plaintiffs herein, and for that reason now come in and

join as plaintiffs in this action, and make themselves (or if it be necessary that this Honorable Court should make an order in that respect, ask that they be made) parties plaintiff herein.

Thereupon these plaintiffs allege and say:

That they adopt the several allegations of the complaint
22 herein which show, or tend to show:

That the said defendant, the City and County of Denver, was without authority to pass a pretended and so-called ordinance, designated and called, "Ordinance No. 3, Series 1913," and sometimes called, and by the defendants pretending to be styled:

"An ordinance assessing the whole cost of acquiring and establishing certain real estate in the East Denver Park District as public parks and parkways against all the real estate subject to assessment therefor in said East Denver Park District, making certain findings and providing the manner of payment of said assessment."

And these plaintiffs jointly and severally allege:

That the said pretended ordinance and the provisions thereof abridge the privileges and immunities of citizens of the United States, and abridge, and attempt to abridge, the privileges and immunities of these plaintiffs, severally and respectively, as citizens of the United States.

That the said "certain real estate" in the said supposed and so-called East Denver Park District, the whole cost of acquiring and establishing which as public parks and parkways, is, by the pretended and so-called ordinance, attempted to be assessed against property, as in the said ordinance mentioned and attempted, and a part of which cost is thereby attempted to be assessed against the several properties of these plaintiffs, as hereinafter more particularly set forth, was not, and has not been acquired, for or as a public park, public parks, public parkway or public parkways.

That no special benefits or benefit accrue, have accrued,
23 or can accrue to the property of these several plaintiffs, or to the property of either or any of them, on account of the said supposed acquisition of the said certain real estate, or the said supposed or attempted establishment of the said supposed public parks and parkways, in the said supposed and so-called ordinance mentioned.

That the so-called Park Commission of the said City and County of Denver, never did, with the approval of the Mayor, or under or by virtue of any proceedings, duly, or at all, had or done, in strict or substantial conformity with or pursuant to the Charter of the said City and County of Denver, acquire the said supposed certain real estate, in the said supposed and so-called East Denver Park District, for the cost of acquiring which, and establishing the said supposed real estate as public parks and parkways, the said pretended assessments hereinafter mentioned, or any of them, are attempted to be made, and that the said supposed proceedings, by which the said City and County of Denver attempted to acquire the supposed real estate, and establish the same as public parks and parkways, were not in conformity with the Charter of the said City and County of Denver; that the said supposed real estate was not acquired, and that

the same was not established as public parks and parkways, in conformity with the provisions of the said Charter, but contrary to, and in disregard thereof; that the cost of acquiring said supposed certain real estate for parks and parkways was never definitely determined by the said supposed and so-called Park Commission of the said City and County, and that the said supposed and so-called Park Commission never filed with the Clerk of the City and County of Den-
24 ver, a statement showing the particulars required by Sections 328 and 298 of the said Charter, or apportioning said supposed cost upon each lot or tract of land to be assessed for the same, in accordance with the supposed benefits accruing to each piece of said real estate, in consequence of the acquisition and establishment of the said supposed parks and parkways.

That the Clerk of the said City and County never duly notified the owners of real estate to be assessed for said supposed cost, or all other persons interested generally, and never notified these plaintiffs, in the manner, for the time, or of the particulars specified in Section 299 of said Charter, or otherwise, of the cost to be assessed against them, or either of them, or their said several properties, or the property of either or any of them, hereinafter mentioned.

That the Board of Supervisors of said City and County never sat as a Board of Equalization, pursuant to, or in accordance with Section 300 of said Charter, to hear and determine all, or any, complaints or objections filed with the Clerk of said City and County in response to said supposed notice, and never did hear or determine such complaints or objections, and that the said so-called Board of Supervisors was and is without authority to hear or determine, or to pass upon, such, or any, complaints or objections to the said pretended, or any assessment, and that there is in the said Charter no provision for hearing, determining, or passing upon such complaints or ob-
25 jections, or for equalizing any assessment made for any such purpose, or pretended purpose, as that for which the said pretended assessment against the property of these several plaintiffs is now attempted to be made, as in the complaint, and herein, mentioned, or otherwise.

That the said pretended sitting of the said so-called Board of Supervisors, as it is pretended, as a Board of Equalization, in pretended pursuance of said pretended notice was a sham and a fraud, and was not had or held as, and did not sit for the purpose of equalizing assessments, or hearing or determining the, or any, objections or complaints against said assessments, and the pretended action of the so-called Board of Supervisors, pretending to sit as a Board of Equalization, in overruling said complaints and objections, was likewise a sham and a fraud, and while, at the said pretended sitting, the said Board of Supervisors, pretending to act as a Board — Equalization, did pretend to sustain the objection of one Clark, to the amount of a total of Fourteen Dollars and Sixty-five Cents, ($14.65) the said pretended action was merely for the purpose of pretending to show that the said Board of Supervisors sat as a Board of Equalization, and did pretend to hear and determine said pretended objections and complaints, and to equalize said attempted assessment.

That the said pretended sustaining of the said particular objection was for the purpose, and for the purpose alone, of giving color to the pretense that the said pretended Board of Equalization had heard and determined said pretended complaints and objections,
26 and had passed upon the same, and had equalized the said pretended and so-called assessment of pretended and so-called special benefits, and to deprive these plaintiffs and other simularly situated of their rights under the Constitution of the United States, to be heard, and to make it appear that these plaintiffs had the benefit of due process of law, and an opportunity to be heard, when it was at all times known by the so-called Board of Supervisors, and by these plaintiffs, and by all other persons similarly situated, that the said so-called Board of Supervisors was without power or authority to act as a Board of Equalization to equalize said pretended and so-called assessment for special benefits, and without power or authority to hear or determine the, if any, complaints or objections, and without power or authority to pass upon the same, and that the said so-called Board of Supervisors, pretending to sit as a Board of Equalization, would not undertake or attempt to equalize, adjust, or in any manner determine the said pretended and so-called assessments, or the equality thereof, or whether or not the property of these plaintiffs, or of people generally, was or was not specially benefitted, or if benefitted, to what extent, or whether the pretended and so-called assessment for special benefits did or did not equal the amount undertaken to be and about to be levied and assessed against them and upon their said properties.

That the said supposed certain real estate so acquired by the said City and County, under the name and guise of, and for the pretended purpose of, establishing the same, as public parks and highways, was not acquired, or attempted or intended to be acquired by
27 the said City and County to be used as or for the purpose of public parks and parkways, but was acquired for other and different purposes, and that the said City and County has not and had not any authority to levy or assess the cost of any such acquisition or establishment against the property of these plaintiffs, under the guise or pretended form of assessments for special benefits.

That the said property was acquired and intended to be acquired for general public purposes, which in so far as those purposes were legally justified, or authorized by any law, relate to the acquisition of property for general purposes, and the general use and benefit of the City and County as a whole, and could not and cannot specially benefit the property of these plaintiffs, or other similarly situated, except as it may, if the purpose thereof should turn out to have any benefit in any way, benefit property in said City and County generally, and in proportion to its value.

That the property so acquired by the said City and County of Denver, the entire cost of which acquisition is attempted to be assessed upon property, including that of these plaintiffs, under the guise of special benefits, is situated directly in front of and adjoining the State Capitol Building and the grounds thereof, and between the said Capitol Building and its grounds and a certain public building

heretofore established by the said City and County as a Public Library, and that one of the declared purposes of the said acquisition was to beautify, enlarge and enhance the scope and effect of the said Capitol grounds and the surrounding view of the said library,
28 and that another of the said purposes thereof was and is, that thereafter the said City and County should and would acquire, facing upon the grounds so acquired, other grounds, for the purpose of erecting thereon public buildings, such as Court House, City Hall, etc., the particulars in this respect being too lengthy to justify repetition herein, and thereby make and establish a general public improvement for the general benefit of all the people, and that the actual purpose of the said supposed acquisition of lands, the cost of which is now attempted to be levied against the property of these plaintiffs and others similarly situated, as assessments for special benefits, was to provide grounds for general public, municipal and county buildings, and to be used as such.

That another purpose of the said supposed acquisition of the said lands was to restrict and confine the business district of the said City, and to prevent the spreading of business establishments over a large territory, and into residence sections, so that the harmony of the general plan of the promotors of the scheme for the acquisition of the said property, the cost of acquiring and establishing which it is now attempted to assess against the property of these plaintiffs and others similarly situated, might be maintained.

That it was at all times, since the beginning of the pretended proceedings, by virtue of which the supposed property was acquired, and by virtue of which it is now attempted to assess the cost of such acquisition against the property of these plaintiffs and others similarly situated, well known to the public authorities of the
29 said City and County and to all those vested with authority concerning the doings and things which resulted in the present attempt to levy and assess the cost of said acquisition against the property of these plaintiffs and others similarly situated, that the said acquisition and the said establishment did not tend to, and could not and would not result in special benefit to the property of these plaintiffs or others similarly situated, but only, if at all, in general benefit, and that the scheme, plan and device of attempting to provide for the cost of acquiring the said real estate, and establishing the same under the name of public parks and parkways, was merely because the cost thereof could not under the law be otherwise levied or assessed, and that the same was a plan, scheme, device and artifice, to avoid the law, and to acquire the said property in defiance thereof, and to obtain from these plaintiff's and others similarly situated, the cost and price thereof, under the guise of special benefits, well knowing that no special benefits on account thereof were or would be obtained, accrue to or result to, these plaintiffs or their property, or to others or to the property of others similarly situated.

That these plaintiffs are informed and believe, and upon information and belief allege that in the proceedings by the city authorities, to prevent, hinder and make ineffectual the protests against the said

assessment, there was actual fraud in that in divers instances, property owners of the said City and County, who had the right to protest, and whose joining in the protest against the said assessment, would have prevented the same, notwithstanding the
30 said pretense in the complaint mentioned, were paid large sums of money for their property, without any purpose soever except to bribe said property owners into withdrawing, or failing to file protests against said plan, scheme and purpose, some of which sums of money were paid by addition to price over and above the just and fair value of the property acquired, and in some instances property was acquired and paid for many times in excess of its actual value, and for purposes not included in the general plan, or within the scope of the general plan for establishing parks and parkways, and the said property added to the said scheme, and that thereby the cost of the property acquired was increased about one-third, and this additional cost is included in the pretended assessment for special benefits now atempted to be levied against the property of these plaintiffs and others similarly situated.

That the said Park Commission never selected the real estate, the cost of which is now attempted to be assessed against the property of these plaintiffs and others similarly situated, as assessment for special benefits, and never took the steps and measures for the acquisition of such real estate which were required by lay; that no notice to property owners of the so-called East Denver Park District was ever given by the said Park Commission, in connection with the supposed asquisition of the said real estate, or the establishment of the same as public parks and parkways, and that no such notice was ever published as is required by the Charter of said City and County, and that no such notice was ever published in accordance with the requirements of the said Charter.

31 That a remonstrance, subscribed to by the owners of twenty-five per cent, in area, of the real estate, now sought to be taxed for the cost of acquiring and establishing the said so-called parks and parkways, was filed within the time limited by law, with the Secretary of the said Park Commission and that thereafter the said City and County had no authority to proceed with the said pretended and so-called acquisition, or with the pretended scheme and purpose mentioned.

That the cost of acquiring the said real estate for the said supposed parks and parkways was never definitely determined, and that the said Park Commission never did, duly or at all, certify or file with the Clerk of the said City and County, a statement showing the particulars as required by Section- 328 and 298 of the Charttr of said City and County or apportioning said supposed cost upon each lot or tract of land now attempted to be assessed for the same, in proportion to the supposed benefits accruing or resulting to each piece, by reason of the acquisition and establishment of the said parks and parkways, as provided by the said Charter, or otherwise.

That the Clerk of the said City and County never, duly or at all, notified the owners of the real estate which it is proposed should be assessed, as provided in said Charter, or otherwise.

That no opportunity was ever given to the property owners against whom it is now proposed to assess the supposed cost of acquiring and establishing said supposed and so-called parks and parkways, under the guise of special benefits, to appear before any board au-
32 thorized to hear and determine complaints and objections concerning the pretended assessment.

That the said pretended assessments, by the said ordinance pretended to be levied, assessed and made against the property of these plaintiffs and each of them, is outrageous, unjust, confiscatory, and without any regard soever to any supposed benefit that might possibly accrue to them or either or any of them, or to their said several respective properties or any of them.

That the said pretended assessments are attempted to be made upon the property of these plaintiff's and others in a similar situation, without ratio, proportion, scheme or plan; that the said pretended benefits are purely guess work, chimerical and have no reasonable proximation, and that the assessments attempted to be levied against said property have not been arrived at through any conceivable scheme of benefit that any property might possibly now, or hereafter, or at any time, derive from the acquisition of said lands, and the pretended establishment of the same for the pretended purpose mentioned.

That the said assessments are individual, favorable or unfavorable according to individual preference of the said City to respective owners; that the basis thereof is neither distance from said acquired lands, front foot, area, nor value, nor is there any other criterion by which the justice or reasonableness thereof, or the pretended benefits therefrom can be measured, arrived at or determined.

33 That the said Westminster Mortgage Company is the owner of Lot 10, Block 2, Scherer's Addition to Denver. That the pretended assessment against the said lot for the said pretended special benefits is the sum of $37.37; that said pretended assessment against said lot greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lot mentioned; and that the said pretended assessment against said lot is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said Theresa Jarecki is the owner of Lots 1, 2 and 3, in Block 1, Brown's Park Addition. That the said pretended assessment against the said lot 1 for the said pretended special benefits is the sum of $67.55, and against said lots 2 and 3 $48.26 each; that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against

said lots is upon a different plan, by a different ratio and in a different proportion than the pretended assessment for the said purpose of other lots similarly situated owned by other persons and corporations.

34 That the said E. F. Crary is the owner of Lots 3 and 4, Block 172, East Denver. That the pretended assessment against the said Lot 3 for the said pretended special benefits in the sum of $555.46, and against the said Lot 4 the sum of $504.96; that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion than the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said E. F. Crary is and at all the times in the complaint and herein mentioned, was a citizen of the State of California, and that the said Lots 3 and 4, Block 172, are by the said attempted pretended assessment attempted to be taxed and made to bear and answer for a larger sum in propertion to the costs of the said so-called improvement than is property similarly situated belonging to citizens of the State of Colorado; and that by the said pretended and so-called assessment the said E. F. Crary is denied the privileges and immunities of a citizen of the State of Colorado, and of the United States.

That the said K. D. O'Donnell is the owner of Lots 17, 18 and 19, Block 224, Clement's Addition, and that the pretended as-
35 sessment against said lots for the said pretended special benefits is the sum of $42.27 each. That the said pretended assessment against said lots greatly exceeds in amount the assessments of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion than the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said K. D. O'Donnell is the owner of Lots 10 and 11, Block 326, Capitol Avenue Subdivision, and that the pretended assessment against the said lots for the said pretended special benefits is the sum of $26.30 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from

the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

36 That said K. D. O'Donnell is the owner of Lots 14, 15 and 16, Wyman's Addition to the City of Denver; and that the pretended assessment against said lots for the said pretended special benefits is the sum of $67.32 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said K. D. O'Donnell is the owner of Lots 11 and 12 Block 7, Whitset's Addition to the City of Denver; and that the pretended assessment against the said lots for the said pretended special benefits is the sum of $75.89 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatever would be benefitted to a greater extent and in a higher sum than the said lots mentioned and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion

37 from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said lots last mentioned are situated in that portion of the said City and County of Denver which lies due south of the said land so acquired and pretended to have been laid out as a public park and in the complaint herein mentioned and referred to as the Civic Center. That the business district of the said City and County lies to the north and northerly of the said land so acquired. That the purpose of the acquisition of the said land and the pretended laying out of the same as a public park was as in the complaint and herein aforesaid to restrict and confine the business district of said City to the north of the said land so acquired, and to prevent the same from spreading over and going into the property to the south thereof; and the said purpose was and is to prevent the said lots in said Whitset's Addition from becoming business property, and to restrain and confine the same to residence purposes. That the said property is residential property of a cheap class, and does not now produce any income, and cannot be made to produce any considerable or adequate income upon its value. That until the establishment of the said so-called Civic Center, and the acquisition of the said land for the purpose of establishing the same as in the complaint and herein referred to, the said property had greater actual value by reason of a just expectancy that said business district in said City

would shortly spread so as to include the said property; and
38 that the result of the acquisition of said land for the purpose for which it was acquired and of the scheme and plan, has been and is to actually damage said lots in said Whitset's Addition in a very large sum of money; that the actual damage thereto greatly exceeds the amount attempted to be assessed as special benefits against the same, and that the said pretended improvement is and will continue to be an actual damage and detriment to the said property and not a benefit.

That the said T. J. O'Donnell is the owner of the South ½ of Lot 11, and of Lots 12 and 13, Block 23, Wyman's Addition to the City of Denver; and that the pretended assessment against the said Lot 11 for the said pretended special benefits is the sum of $67.31, (the said lot being assessed as a whole lot, and no assessment being made against said ½ *half* lot as such); and against the said Lots 12 and 13 the sum of %67.31 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is on a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said T. J. O'Donnell is the owner of Lots 20 and 21, and the South ½ of Lot 32, John S. Flower's Addition to Block
39 65 Porter's Addition to Denver; and that the pretended assessment against said lots 30 and 31 for the said pretended special benefits is the sum of $105.24 each; and against the said lot 32 the sum of $105.24, said lot being assessed as a whole lot. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio, and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger are the owners of lots 9 to 14 both inclusive, Block 35, of the Town of Swansea; and that the pretended assessment against the said lots for the said pretended special benefits is the sum of $5.27 each. That the said pretended assessment against the said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said

pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the
40 pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations That the said M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger are the owners of Lots 27 and 28, Block 48, First Addition to Swansea; and that the pretended assessments against the said lot 27 for the said pretended special benefits is the sum of $6.55, and against said lot 28 the sum of $7.39. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum that the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That said blocks 35 and 48 lie about five miles in a northeasterly direction from the said so-called Civic Center and the property acquired for the purposes thereof as in the complaint and herein mentioned, and are separated from the main portion of the said City of Denver and from the portion in which the said land so acquired is situated by the trunk lines of a number of the principal railroads entering the City of Denver. That said lots have no value except for
41 manufacturing purposes. That there is no homogen-ous connection or relation between the neighborhood in which said lots are situated, and that for the pretended benefit of which the said land has been acquired; and that the attempted inclusion of the said lands in the said park district was and is arbitrary and unreasonable, and that the said pretended assessment against the said lots and each of them is for the reason in this paragraph given, in addition to the general reason herein alleged, illegal and confiscatory; and that the said pretended assessment when added to other assessments for special benefits and the general taxes recently laid against the same by the said City and County of Denver amounts to a confiscation of tht said property and exceeds the value of the said lots.

Wherefore, the said parties herein join in this suit as plaintiffs, and pray for all the relief asked in the complaint herein, and for such additional, further and other relief as they may severally be entitled to in view of the premises.

By T. J. O'DONNELL,
J. W. GRAHAM,
CANTON O'DONNELL,
Their Attorneys.

42–4 STATE OF COLORADO,
City and County of Denver, ss:

T. J. O'Donnell, of lawful age, being first duly sworn, upon his oath doth depose and say:

That he is one of the parties above mentioned, joining as plain-

tiffs in this suit, and is one of the attorneys for the others therein mentioned; that he makes this verification on behalf of all of the said parties now joining as plaintiffs in this action; that he has read the allegations made on behalf of the said several parties jointly and severally, and knows the contents thereof, and that the matters and things therein contained are true of his own knowledge, except as to those things therein stated upon information and belief, and as to those things he believes them to be true.

(Signed) T. J. O'DONNELL.

Subscribed and sworn to before me this 24th day of April, A. D. 1913.

My commission expires Oct. 2, 1913.

(Signed) FRANKLIN P. WHITE,
[SEAL.] *Notary Public.*

45 Thereafter, and on, to-wit, May 9th, 1913, a general demurrer on the ground that said petition and complaint failed to state facts sufficient to constitute a cause of action, was interposed by the defendants "and each of them."

Thereafter, and on, to-wit, the 18th day of September, 1914, the said demurrer to the original complaint and as well the demurrer to the petition and complaint in intervention came on for hearing, and after argument of counsel on behalf of the respective parties, the court did sustain both of said demurrers, to which ruling of the court the original plaintiffs, and the intervening plaintiffs, by their respective counsel, then and there duly excepted.

Thereafter, and on, to-wit, the 2nd day of January, 1915, in pursuance of leave of court granted at the time said demurrers were sustained, all the named plaintiffs herein, to-wit, Henry Farncomb, Emma Donahue, Henry Lorie, M. N. Campbell, The Westminster Mortgage Company, a corporation, Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger, and I. Singers-Bigger, filed their amended complaint herein which is in words and figures as follows, to-wit:

46 STATE OF COLORADO,
City and County of Denver, ss:

In the District Court, Div. 2.

No. 55316.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, M. N. CAMPBELL, The Westminster Mortgage Company, a Corporation; Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger, and I. Singers-Bigger, for and on Behalf of Themselves and All Other Taxpayers of the City and County of Denver Similarly Situated and Interested, Plaintiffs,

VS.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; HENRY J. ARNOLD, as Mayor of the City and County of Denver; John S. Macbeth, W. W. Porter, W. M. Downing, E. W. Robinson, and Thomas R. Long, as Members of the Park Commission of the City and County of Denver; John S. Macbeth, as President of said Park Commission; James F. Markey, as Auditor of the City and County of Denver; Otto Thum, as Clerk of the City and County of Denver; Allison Stocker, as Treasurer of the City and County of Denver, and Clair J. Pitcher, as Assessor of the City and County of Denver, Defendants.

Amended Complaint.

Come now the plaintiffs above named, by their attorneys, Omar E. Garwood, Bert Martin, and T. J. O'Donnell, for and on behalf of themselves and on behalf of all other taxpayers of the City and County of Denver who are similarly situated and interested, and complaining of the defendants, they allege:

That the defendant, the City and County of Denver, is a municipal corporation, existing under and by virtue of the twentieth amendment to the Constitution of the State of Colorado.

That the said City and County of Denver, pursuant to said twentieth amendment to the Constitution of the State of
47 Colorado, heretofore adopted a charter, which divided the City and County of Denver into four Park Districts, said division being made by article 323 of said charter, which is in words and figures as follows, to-wit:

"Section 323. The City and County is hereby divided into four park districts, consisting respectively of the following territory:

The Montclair park district, all that part of the city and county lying east of McKinley Avenue, formerly Colorado Boulevard.

The South Denver park district, all that part of the city and county lying south and west of Cherry Creek and easterly from the Platte River.

The Highland park district, all that part of the city and county lying north and west of a line beginning on the southerly boundary line of the city and county at its intersection with the Platte River, following the course of the Platte River in a northerly direction to the intersection with Cherry Creek, thence southeasterly along Cherry Creek to its intersection with Larimer Street, thence along Larimer Street to its intersection with Downing Avenue, thence along Downing Avenue to Thirty-eighth Street, along Thirty-eighth Street to the Platte River, following the course of the Platte River to its intersection with the northerly boundary line of the city and county.

The East Denver park district, all the remaining territory of the city and county."

That the defendants John S. Macbeth, W. W. Porter, W. M. Downing, E. W. Robinson and Thomas R. Long, were members of the Park Commission appointed under the provisions of the charter of the City and County of Denver, by the Mayor of the City and County of Denver at all the times herein mentioned.

That the defendant, Henry J. Arnold, was the duly elected, qualified and acting Mayor; that the defendant, Allison Stocker, was the duly elected, qualified and acting Treasurer; that the defendant, Otto Thum, was the duly elected, qualified and acting City Clerk; that the defendant, Clair J. Pitcher, was the duly elected, qualified and acting Assessor, of the City and County of Denver, at the time of the commencement of this suit.

That the defendant, James F. Markey, was the duly elected,
48 qualified and acting Auditor of the City and County of Denver at the time of the commencement of this suit, and still is such Auditor.

That since the commencement of this suit the charter of the City and County of Denver has been amended, and what is commonly called the commission form of government has been adopted for the said City and County, and it is provided in said amendment to said charter that :

"The executive and administrative powers and duties of the city and county shall be divided into five departments, as follows:

1. Department of Property.
2. Department of Finance.
3. Department of Safety.
4. Department of Improvements.
5. Departmentof Social Welfare." (Sec. 24.)

That under and by virtue of said amendment to the charter, and as the said charter now stands, the Commissioner of Property exercises the powers and performs the acts and duties which were, prior to the adoption of said amendment, required of, or provided to be exercised and performed by, the Park Commission, and that the defendant, Otto Thum, is now the duly elected, qualified and acting Commissioner of Property of said City and County.

That under and by virtue of said amendment to the charter, and as the said charter now stands, the Commissioner of Finance exercises the powers and performs the acts and duties which were, prior to

the adoption of said amendment, required by the Constitution and general laws of the State to be exercised and performed by the County Treasurer and County Assessor, and in addition thereto all the powers and duties of the Treasurer and Assessor of said City and County, and that the defendant, Clair J. Pitcher, is now the duly elected, qualified and acting Commissioner of Finance of said City and County.

That Alexander Nisbet is the duly elected, qualified and acting Commissioner of Safety; that John B. Hunter is the duly elected, qualified and acting Commissioner of Improvements; and that J. M. Perkins is the duly elected, qualified and acting
49 Commissioner of Social Welfare, of said City and County of Denver.

That the defendants, the City and County of Denver, and the said several officials thereof hereinbefore mentioned, set up, maintain and claim that the said City and County of Denver did duly pass, and that there is now in force, that certain ordinance which, omitting the description of the various parcels of real estate therein mentioned and described, is in words and figures as follows, to-wit:

50 By Authority.

Ordinance No. 3. Series 1913.

Aldermanic Bill No. 3 Introduced by Alderman McLane.

A Bill for an ordinance assessing the whole cost of acquiring and establishing certain real estate in the East Denver Park District as public park and parkways against all the real estate subject to assessment therefor in said East Denver Park District, making certain findings and providing the manner of payment of said assessment.

Whereas, The Park Commission of the City and County of Denver, with the approval of the Mayor, has under and by virtue of proceedings duly had and done in strict conformity with and pursuant to the Charter of the City and County of Denver, acquired certain real estate in East Denver Park District and established the same as parks and parkways in said District, and the cost of acquiring certain real estate for parks and parkways having been definitely determined, said Park Commission did duly prepare, certify and file with the Clerk of the City and County of Denver, a statement showing the particulars required by Sections 328 and 298 of the said Charter, and apportioning said cost upon each lot or tract of land to be assessed for the same in proportion to the benefits to each piece of real estate accruing in consequence of the acquisition and establishment of such parks and parkways; and,

Whereas, the Clerk of the City and County of Denver, thereupon duly notified the owners of real estate to be assessed for said costs, and all other persons interested generally, in the manner, for the

time and of the particulars specified in Section 299 of said Charter; and,

Whereas, pursuant to and in response to such notice complaints and objections in writing by certain of the owners of real estate in said East Denver Park District, were filed with the Clerk of the City and County; and thereafter the Board of Supervisors of said City and County, sitting as a Board of Equalization, did pursuant to and in accordance with Section 300 of said Charter duly hear and determine each and all of said complaints and objections so filed, and did overrule the same and did recommend to the Park Commission of said City and County, that no modification of its apportionments of said assessment, as set forth in said notice, be made, save and except that the proposed assessment against lots 3 and 4 of block 146, South Division of Capitol Hill, William H. Clark, owner, be reduced in the sum of Fourteen Dollars and Sixty-five Cents ($14.65) for each lot; and the said Park Commission did thereafter, pursuant to the provisions of said Charter, duly confirm the first apportionment of assessments as originally made and as set forth in said notice, save and except that it modified the proposed assessment against lots 3 and 4 of block 146, South Division of Capitol Hill, William H. Clark, owner, by reducing the same in the sum of Fourteen Dollars and Sixty-five Cents ($14.65) for each lot; and said Park Commission thereafter duly notified the Council of said City and County of its final action in the premises; and

Whereas, All provisions of law and of the Charter of the City and County of Denver in the premises have been duly observed and complied with.

Now Therefore,

Be It Enacted by the Council of the City and County of Denver:

Section 1. That the Council of said City and County finds that the Park Commission heretofore, with the approval of the
51 Mayor, duly selected certain real estate to be acquired by the City and County of Denver for parks and parkways in the East Denver Park District, and duly took such steps and measures as were required by the provisions of Article XI of the Charter of said City and County, for the acquisition of such real estate;

And the Council Further Finds, That the notice to property owners of the East Denver Park District, given by the Park Commission in the matter of the acquisition of certain real estate within said District and in establishing the same as parks and parkways, which was published in the Denver Republican, a daily newspaper published in said City and County, on the 18th day of August, 1909, and daily thereafter in said newspaper until and including the issue of August 28, 1909, was due notice and was duly given in full conformity with the requirements of the Charter of said City and County, and was in full compliance with said requirements;

And the Council Further Finds, That a remonstrance subscribed by the owners of twenty-five per cent, in area of the real estate which is to be assessed for the cost of acquiring said parks and parkways in the East Denver Park District, was not filed with the Secretary of said Commission and was not subscribed by the required

number of owners as required by the provisions of said notice last above mentioned and the provisions of the said City and County; and that the said improvements namely, the acquisition of certain real estate and establishing the same as parks and parkways was duly ordered after the time limited in said Section 327 and specified in said notice;

And the Council Further Finds, That the Park Commission thereafter, with the approval of the Mayor, and in strict conformity with the provisions of said Charter, duly acquired the said real estate theretofore selected by it for parks and parkways in said East Denver Park District and established the same as parks and parkways.

And the Council Further Finds, That upon the cost of the acquiring of said real estate for parks and parkways in said East Denver Park District having been definitely determined and ascertained, the said Park Commission did duly prepare, certify and file with the Clerk of the City and County of Denver, a statement showing the particulars required by Sections 328 and 298 of said Charter, and also apportioning said cost upon each lot or tract of land to be assessed for the same in proportion to the benefits to each piece of real estate accruing and resulting in consequence of the acquisition and establishment of such parks and parkways, all as provided in the Charter of said City and County and particularly in Article XI thereof.

And the Council Further Finds, That the Clerk of said City and County thereupon duly notified the owners of the real estate to be assessed for said improvement in the manner, for the time, and of the particulars specified in Section 299 of said Charter, and that said notice was duly published first in the Daily News, a daily newspaper published in the City and County of Denver, Colorado, on the 7th day of October, 1912, and daily thereafter in said newspaper until and including the issue of the 17th day of October, 1912, all of which was done in full conformity and compliance with the requirements of the Charter of said City and County.

And the Council Further Finds, That pursuant to and as a result of said last mentioned notice there were filed with the Clerk of said City and County complaints and objections in writing to the Board of Supervisors by certain of the owners of real estate in said East Denver Park District, which complaints and objections are now on file with the Clerk of said City and County, and to which
52 reference is hereby made; and that no other or further complaints or objections were filed or made with the Clerk of said City and County or with the Board of Supervisors by any owner of real estate within said District or other person on or before the 10th day of December, 1912; and that thereafter said Board of Supervisors, sitting as a Board of Equalization, did, pursuant to and in accordance with Section 300 of said Charter, duly hear and determine each and all of said complaints and objections so filed and did overrule the same and did recommend to the Park Commission of said City and County that no modification of its apportionments of said assessment, as set forth in said notice, be made, save and except that the proposed assessment against lots 3 and 4 of block

146, South Division of Capitol Hill, be reduced in the sum of Fourteen Dollars and Sixty-five Cents, ($14.65) for each lot; and the said Park Commission did thereafter, pursuant to the provisions of said Charter and particularly Section 300 thereof, duly comfirm the first apportionment of assessments as originally made and as set forth in said notice, save and except that it modified the proposed assessment against lots 3 and 4 of block 146, South Division of Capitol Hill, by reducing the same in the sum of Fourteen Dollars and Sixty-five Cents ($14.65) for each lot; and that the Park Commission did thereafter duly notify the Council of said City and County of its final action in the premises.

And the Council further finds, That the said apportionment was duly, properly and justly made in accordance with the benefits accruing and resulting to each lot or tract of land to be assessed within said Park District for the cost of said improvements, namely, the acquisition and establishment of said real estate for parks and parkways therein.

And the Council further finds, That all provisions of law and of the Charter in the premises have been duly observed and complied with.

Section 2. That the total cost of said improvement is, including four per centum flat for the cost of collection and other incidentals and also including interest to March 1, 1913, at the rate of five and one-half per centum per annum on the bonds issued in payment of the cost of acquiring said real estate, Two Million Nine Hundred and Forty-eight Thousand Seven Hundred and Forty-six Dollars and Ninety-nine Cents ($2,948,746.99); and that the said total cost be and the same is hereby assessed upon and against all the real estate in said East Denver Park District as said District is defined in Section 323 of said Charter, except parks, parkways and streets, and in accordance with the apportionments made by the Park Commission; said assessments being in accordance with the special benefits derived by and resulting to said real estate by reason of said improvements, that is to say:

The said assessment is in the following proportion and amounts severally, to-wit:

Note A. Whenever in the following descriptions the number of the first and last lots of a series of lots are mentioned, such description shall, in every case, be understood to include (1) the intermediate and the last named lots.

Note B. Where more than one amount is given for a block or for a tract of land, the sum of the several amounts is to be taken for the total assessment against the block or the tract of land. * * *

Section 3. All the assessments herein made shall be due and payable within thirty days of the publication of this assessing ordinance without demand to the Treasurer of the City and County of Denver, and when so paid, an allowance of four per centum flat added for cost of collection and other incidentals and also interest at the rate of five and one-half per centum per annum from the time of
53 said payment to March 1, 1913, shall be made and deducted;

provided that all such assessments may at the election of the owners be paid in installments with interest as hereinafter provided. Failure to pay the whole assessment within said period of thirty days shall be conclusively considered and held an election on the part of all persons interested, whether under disability or otherwise, to pay in such installments. All persons so electing to pay in installments shall be conclusively considered and held as consenting to said improvements and such election shall be conclusively held and considered as a waiver of any and all right to question the power and jurisdiction of the said City and County to make said improvements, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessment.

Section 4. In case of election to pay said assessment in installments as hereinabove provided, the principal of said assessment shall be payable in ten equal annual installments, the first of which shall be due and payable March 1, 1918, and another in each succeeding year thereafter at the same date until all are paid. Interest on the unpaid installments must be paid annually on March 1 hereafter, beginning with March, 1914, at the rate of five and one-half per centum per annum.

Section 5. Failure to pay any installment, whether of principal or interest, when due, shall cause the whole of the unpaid principal to become due and payable immediately and the whole amount of the unpaid principal and accrued interest shall thereafter draw interest at the rate of one per cent per month or fraction of a month until the day of sale as hereinafter provided; but at any time prior to the day of sale the owner may pay the amount of all delinquent installments with interest at 1 per cent per month or fraction of a month as aforesaid, and all penalties accrued, and shall thereupon be restored to the right thereafter to pay in installments in the same manner as if default had not been suffered. The owner of any piece of real estate not in default as to any installment or payment may at any time pay the whole unpaid principal with the interest accrued.

Section 6. The Treasurer shall receive payment of all assessments against any real estate appearing upon the assessment roll with interest, and in case of default in the payment of any installment of principal or interest when due, shall advertise and sell any and all real estate concerning which such default is suffered for the payment of the whole of the unpaid assessments thereon; and said sales and advertisements shall be made at the same time or times, in the same manner, under all the same conditions and penalties, and with the same effect as are provided by general law for the sales of real estate in default of payment of general taxes.

Section 7. All moneys collected from said assessments shall be applied to, and the same are hereby appropriated for, the payment of the bonds issued in respect to said improvements and the interest thereon in accordance with the provisions of the Charter of said City and County.

JNO. W. FORD,
President of the Board of Alderman.
JOHN B. McGAURAN,
President of the Board of Supervisors.

Signed and approved by me this 15th day of January, A. D. 1913.
HENRY J. ARNOLD, *Mayor.*

Attested by the undersigned with the corporate seal of the City and County of Denver.
[SEAL.]
OTTO F. THUM,
Clerk of the City and County of Denver,
By C. J. MOREHOUSE, *Deputy.*

Published in the Denver Times January 25th, 1913.

54 That under and by virtue of the said supposed ordinance, the defendant, the City and County of Denver, has undertaken to levy and assess against the several properties of the plaintiffs hereinafter described and mentioned, the unjust, unauthorized, illegal and extortionate tax, under the guise of an assessment for special benefits, hereinafter mentioned and set out, and the said several officers of the said City and County herein named, acting or pretending to act as such officers, and as well the said City and County, set up, maintain and claim the said several levies and assessments against the several properties of the several plaintiffs herein, to be good and valid levies and assessments against the said several properties and each of them, for the amounts hereinafter mentioned in connection with the several properties of the several plaintiffs, and that the said City and County of Denver, and the said several officers thereof, threaten and declare that they will, unless the plaintiffs pay the said several pretended and so-called assessments and taxes levied against their several properties, sell the said several properties to pay the same, in the manner provided by law for the sale of property to pay taxes legally and properly levied and assessed against real estate, and on account of the attempt of the defendant, the City and County of Denver, and the said several officers thereof, to levy and assess against the several properties of the several plaintiffs, as hereinafter mentioned, the said unjust, unauthorized, illegal and extortionate tax, under the guise of an assessment for special benefits, hereinafter referred to, the plaintiffs have a common interest in resisting said attempt to levy and assess said tax against their several properties, so as aforesaid under the guise of an assessment for special benefits.

But the plaintiffs jointly and severally allege and say:

55 That the said defendant, the City and County of Denver, was without authority to pass a pretended and so-called ordinance, designated as and called, "Ordinance No. 3, Series 1913."

That the said pretended ordinance and the provisions thereof abridge the privileges and immunities of citizens of the United States, and abridge, and attempt to abridge, the privileges and immunities of these plaintiffs, severally and respectively, as citizens of the United States.

That the "certain real estate" in the said supposed and so-called East Denver Park District, the whole cost of acquiring and establishing which as public parks and parkways, is, by the pretended

and so-called ordinance, attempted to be assessed against property, as in the said ordinance mentioned and attempted, and a part of which cost is thereby attempted to be assessed against the several properties of these plaintiffs, as hereinafter more particularly set forth, was not, and has not been acquired, for or as a public park, public parks, public parkway or public parkways.

That no special benefits or benefit accrue, have accrued, or can accrue to the property of these several plaintiffs, or to the property of either or any of them, on account of the said supposed acquisition of the said certain real estate, or the said supposed or attempted establishment of the said supposed public parks and parkways, in the said supposed and so-called ordinance mentioned.

That the so-called Park Commission of the said City and County of Denver, never did, with the approval of the Mayor, or under or by virtue of any proceedings, duly, or at all, had or done in strict or substantial conformity with or pursuant to the Charter of the said City and County of Denver, acquire the said supposed certain real estate, in the said supposed and so-called East Denver Park District, for the cost of acquiring which, and establishing the said supposed real estate as public parks and parkways, the said pretended
56 assessments hereinafter mentioned, or any of them, are attempted to be made, and that the said supposed proceedings, by which the said City and County of Denver attempted to acquire the supposed real estate, and establish the same as public parks and parkways, were not in conformity with the Charter of the said City and County of Denver; that the said supposed real estate was not acquired, and that the same was not established as public parks and parkways, in conformity with the provisions of the said Charter, but contrary to, and in disregard thereof; that the cost of acquiring said supposed certain real estate for parks and parkways was never definitely determined by the said supposed and so-called Park Commission of the said City and County, and that the said supposed and so-called Park Commission never filed with the Clerk of the City and County of Denver, a statement showing the particulars required by Sections 328 and 298 of the said Charter, or apportioning said supposed cost upon each lot or tract of land to be assessed for the same, in accordance with the supposed benefits accruing to each piece of said real estate, in consequence of the acquisition and establishment of the said supposed parks and parkways.

That the Clerk of the said City and County never notified the owners of real estate to be assessed for said supposed cost, or all other persons interested generally, and never notified these plaintiffs, in the manner, for the time, or of the particulars specified in Section 299 of said Charter, or otherwise, of the cost to be assessed against them, or either of them, or their said several properties, or the property of either or any of them, hereinafter mentioned.

That the said Board of Supervisors of said City and County never sat as a Board of Equalization, pursuant to, or in accordance with Section 300 of said Charter, to hear and determine all, or any, complaints or objections filed with the Clerk of said City and County in response to said supposed notice, and never did hear and determine

such complaints or objections, and that the said so-called
57-67 Board of Supervisors was without authority to hear or determine, or to pass upon, such, or any, complaints or objections to the said pretended, or any, assessment, and that there is and was in the said Charter no provision for hearing, determining or passing upon such complaints or objections, or for equalizing any assessment made for any such purpose, or pretended purpose, as that for which the said pretended assessment against the property of these several plaintiffs is now attempted to be made, as herein mentioned, or otherwise.

That the said pretended sitting of the said so-called Board of Supervisors, as it is pretended, as a Board of Equalization, in pretended pursuance of said pretended notice, was a sham and a fraud, and was not had or held as, and did not sit for the purpose of equalizing assessments, or hearing or determining the, or any, objections or complaints against said assessments, and the pretended action of the so-called Board of Supervisors, pretending to sit as a Board of Equalization, in overruling said complaints and objections, was likewise a sham and a fraud, and while, at the said pretended sitting, the said Board of Supervisors, pretending to act as a Board of Equalization, did pretend to sustain the objection of one Clark, to the amount of a total of Fourteen Dollars and Sixty-five cents ($14.65), the said pretended action was merely for the purpose of pretending to show that the said Board of Supervisors sat as a Board of Equalization, and did pretend to hear and determine said pretended objections and complaints, and to equalize said attempted assessment.

That the said pretended sustaining of the said particular objection was for the purpose, and for the purpose alone, of giving color to the pretense that the said pretended Board of Equalization had heard and determined said pretended complaints and objections, and had passed upon the same, and had equalized the said pretended and so-called assessment of pretended and so-called special bene-
68 fits and to deprive these plaintiffs and others similarly situated of their rights under the Constitution of the United States, to be heard, and to make it appear that these plaintiffs had the benefit of the process of law, and an opportunity to be heard, when it was at all times known by the so-called Board of Supervisors, and by these plaintiffs, and by all other persons similarly situated, that the said so-called Board of Supervisors was without power or authority to act as a Board of Equalization to equalize said pretended and so-called assessment for special benefits, and without power or authority to hear or determine the, or any complaints or objections, and without power or authority to pass upon the same, and that the said so-called Board of Supervisors, pretending to sit as a Board of Equalization, would not undertake or attempt to equalize, adjust or in any manner determine the said pretended and so-called assessments, or the equality thereof, or whether or not the property of these plaintiffs, or of people generally, was or was not specially benefitted, or if benefitted, to what extent, or whether the pretended and so-called assessment for special benefits did or did not equal the amount un-

dertaken to be and about to be levied and assessed against them and upon their said properties.

That during the year 1909, the above named Park Commission together with one Robert W. Speer, the then Mayor of the City and County of Denver, connived, confederated and conspired together for the purpose of fraudulently burdening the taxpayers and property owners in said East Denver Park District with the expense of acquiring real estate for the establishment of a proposed so-called Civic Center for the City and County of Denver, under the guise of a pretended park and in pursuance of said conspiracy and confederation, they did cause to be published in certain newspapers in the City and County of Denver, in the month of August, 1909, a pretended notice to all property owners in the said East Denver park district of said proposed purchase, together with a pretended
68½ notice that all of the property owners in the said East Denver park district would be assessed for the purchase of said property and the said Park Commission did, in said pretended notice, find, state and declare that there *was* 65,000 lots in said East Denver park district, that thereafter the property owners in said East Denver park district, protested against the said proposed improvement, there being included in their said protest some 25,000 lots in said East Denver park district, whereupon the said Park Commission did fraudulently and knowingly and for the purpose of defeating said protest, count and include within the limits of said park district all federal property belonging to the United States government, all cemeteries, school buildings and other real property belonging to the City and County of Denver, and thereupon said commission announced that the number of lots included in said East Denver park district for the purpose of said assessment would and did amount to 82,000 lots, when in truth and in fact it was no more than 65,000 lots and thereafter the said Park Commission and the said Robert W. Speer, as Mayor of the City and County of Denver, with other city officials, approach- certain property owners in said park district who had protested against the purchase of said property and the establishment of the said proposed Civic Center and whose protests had been duly acknowledged before a Notary Public and which protests were in proper legal form, and fraudulently made certain offers to said property owners to the effect that if said property owners would withdraw their said protests that they, the said Robert W. Speer, and other City Officials, would procure an advantageous sale of the property belonging to said property owners, to said City and County, and at prices greatly in excess of the market value of said property; and to other property owners the said Robert W. Speer did promise municipal employment if the said property owners would withdraw their protests and that said promises made by the said Robert W. Speer and other City Officials, were made in furtherance of the conspiracy hereinabove described, and for the purpose
69 of fraudulently promoting the said Civic Center scheme contrary to the wishes of a majority of the property owners in said East Denver park district, and that by reason of the said prom-

ises and inducements so made and held out to them the said Robert W. Speer and his associates did induce a large number of said property owners to attempt to withdraw their protests, leaving only 21,000 lots included within said protest but the plaintiffs aver that even with only 21,000 lots included within said protests, said protest was sufficient under the requirements of the charter of the City and County of Denver to defeat the establishment of said Civic Center project, and the acquirement of said property therefor.

Notwithstanding this, the said Park Commission and the said Mayor were determined to establish said Civic Center at the expense of the property owners of the said East Denver park district, regardless of said protest and to that end the said Mayor did appropriate certain funds of the City and County of Denver, through the said Park Commission, for the purpose of influencing the action of property owners in said East Denver park district and for the purpose of keeping and maintaining headquarters where property owners were solicited and persuaded to withdraw their said protests, and in furnishing money for a hired band, kept at said headquarters to attract property owners thereto.

That in attempting to decide the question of the establishment of a Civic Center under the guise of a proposed park, the Park Commission of the City and County of Denver pretended to act under certain sections of the charter of the City and County of Denver which are void and of no force and effect; that the Charter of the City and County of Denver makes no provision whatever for withdrawals of protests in proceedings for the acquirement of property for park purposes, and that such protests when once made can never be withdrawn by any person.

70 That the section of said Charter, being No. 327, which refers to protests against the purchase of property for park purposes is as follows, to-wit:

"The Commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purposes; but if within the time above specified, a remonstrance shall be filed with the secretary of said commission, subscribed by the owners of twenty-five per cent in area of the real estate which is to be assessed, then the proposed purchase or condemnation shall not be made, and the proceedings shall not be renewed for one year thereafter, and the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of persons aforesaid, shall be conclusive in every court or other tribunal."

That plaintiffs aver that all acts of the defendants, with reference to the establishment and acquirement of the property for the said proposed Civic Center under the guise of a park insofar as the same are based upon the withdrawals of protests against said improvement are null and void and contrary to the constitution of the United States and the Constitution of the State of Colorado.

That plaintiffs did not and could not have discovered said fraud above described until a short time prior to the commencement of this action.

That afterwards and on or about the 23rd day of March, 1910, the Board of Alderman and the Board of Supervisors and the Mayor of the City and County of Denver purported to make a finding based upon the said fraudulent report of the Park Commission of the City and County of Denver to the effect that there were not sufficient protests made against the proposed Civic Center improvement in said East Denver park district to defeat the same, said purported finding being made by Ordinance 47 of the series of 1910.

That the said Board of Alderman, Board of Supervisors and the Mayor of the City and County of Denver made no investigation whatsoever as to the truth of the matters contained in the findings of the Park Commission upon which said ordinance was based and that all of the findings attempted to be made in said ordinance number 47, of the series of 1910, were and are void and of

71 no effect.

That the said supposed certain real estate so acquired by the said City and County, under the name and guise of, and for the pretended purpose of, establishing the same as public parks and parkways, was not acquired, or attempted or intended to be acquired by the said City and County to be used as or for the purpose of public parks and parkways, but was acquired for other and different purposes, and that the said City and County has not and had not any authority to levy or assess the cost of any such acquisition or establishment against the property of these plaintiffs, under the guise or pretended form of assessments for special benefits.

That the said property was acquired and intended to be acquired for general public purposes, which, in so far as those purposes were legally justified, or authorized by any law, relate to the acquisition of property for general purposes, and the general use and benefit of the City and County as a whole, and could not and cannot specially benefit the property of these plaintiffs, or any of them, or others similarly situated, except as it may, if the purpose thereof should turn out to have any benefit in any way, benefit property in said City and County generally, and in proportion to its value.

That the property so acquired by the said City and County of Denver, the entire cost of which acquisition is attempted to be assessed upon property, including that of these plaintiffs, under the guise of special benefits, is situated directly in front of and adjoining the State Capitol Building and the grounds thereof, and between the said Capitol Building and its grounds and a certain public building heretofore established by the said City and County as a Public Library, and that one of the actual, and as well of the declared purposes of the said acquisition was to beautify, enlarge, and enhance the scope and effect of the said Capitol grounds and the surrounding view of the said Library, and that another of the said purposes thereof was and is, that thereafter the said City and County

72 should and would acquire, facing upon the grounds so acquired, other grounds, for the purpose of erecting thereon

public buildings, such as Court House, City Hall, etc., the particulars in this respect being too lengthy to justify repetition herein, and thereby make and establish a general public improvement for the general benefit of all the people, and that the actual purpose of the said supposed acquisition of lands, the cost of which is now attempted to be levied against the property of these plaintiffs and others similarly situated, as assessments for special benefits, was to provide grounds for general public, municipal and county buildings, and to be used as such.

That another purpose of the said supposed acquisition of the said lands was to restrict and confine the business district of the said City, and to prevent the spreading of business establishments over a large territory, and into residence sections, so that the harmony of the general plan of the promotors of the scheme for the acquisition of the said property, the cost of acquiring and establishing which it is now attempted to assess against the property of these plaintiffs and others similarly situated, might be maintained.

That it was at all times, since the beginning of the pretended proceedings, by virtue of which the supposed property was acquired, and by virtue of which it is now attempted to assess the cost of such acquisition against the property of these plaintiffs and others similarly situated, well known to the public authorities of the said City and County, and to all those vested with authority concerning the doings and things which resulted in the present attempt to levy and assess the cost of said acquisition against the property of these plaintiffs and others similarly situated, that the said acquisition and the said establishment did not tend to, and could not and would not result in special benefit to the property of these plaintiffs, or any of them, or others similarly situated, but only, if at all, in
73 general benefit, and that the scheme, plan, and device of attempting to provide for the cost of acquiring the said real estate, and establishing the same under the name of public parks and parkways, was merely because the cost thereof could not under the law be otherwise levied or assessed, and that the same was a plan, scheme, device and artifice to avoid the law, and to acquire the said property in defiance thereof, and to obtain from these plaintiffs and others similarly situated, the cost and price thereof, under the guise of special benefits, well knowing that no special benefits on account thereof were or would be obtained by, accrue to or result to, these plaintiffs or any of them, or their property, or any of it, or to others or to the property of others similarly situated.

That on or about the 7th day of December, 1912, the said Board of Supervisors pretended to sit as a Board of Equalization for the purpose of hearing said protests against the proposed assessment of the cost of acquiring said land, but that at said hearing the said pretended Board of Equalization refused to hear any testimony in reference to fraud, in regard to the establishment of said proposed Civic Center, or in regard to the assessment of property in the said East Denver park district, and the said Board of Supervisors, pretending to sit as a Board of Equalization, wrongfully held and ruled

that if there was fraud in any of the proceedings for the establishment of said Civic Center, that the Board of Supervisors was powerless to hear evidence with reference thereto, or to grant any relief, and the defendant, W. W. Porter, then a member of said Park Commission, did testify before said Board of Supervisors then pretending to act as a Board of Equalization, and the plaintiffs allege, and the fact is, that the various assessments against the lots in the said East Denver Park District had not been levied in accordance with the special benefits supposed to accrue thereto, but in the follow-
74 ing manner, and for the following reasons, to-wit: That the principal purpose for which the said Civic Center was inaugurated and projected was that all of the property located in the then present business district of the City and County of Denver (all of which is property other than the property of these plaintiffs, or any of them) would be greatly enhanced in value because the said Civic Center would prevent the establishment of business enterprises south of said Civic Center, and in which direction the retail business of Denver was at that time rapidly moving, and that he, the said Porter, and other members of the Park Commission, prior to the projecting of said Civic Center, had held consultations with leading business men of the City and County of Denver, for the purpose of bringing about a plan to intercept the growth of business enterprises south of said proposed Civic Center, and that the said W. W. Porter further stated that the chief element considered by the said Park Commission in levying the assessments against the various parcels of property in the said East Denver park district was that a certain sum of money had to be raised for the acquirement of the said Civic Center, and no regard whatsoever was had for any supposed special benefits which would accrue to the various parcels of property in said East Denver park district through the establishment of said Civic Center, nor was any regard whatsoever had for the special benefits which would accrue to a large portion of the real estate in the City and County of Denver, which is situate in close proximity to said Civic Center, but is not included in said East Denver park district.

That at said meeting testimony was introduced before said Board of Supervisors by one John S. Flower, showing that there were, and the plaintiffs allege that there were, grossly unequal, inequitable and unjust assessments against parcels of property in the East Denver park district on account of said Civic Center, particularly enu-
merating the lots and blocks on which said unequal, inequi-
75 table and unjust assessments had been levied by the said Park Commission, and that then and there each and every member of the said Board of Supervisors openly and publicly declared that the said assessments so shown by the said John S. Flower were unequal, inequitable and unjust; and that numerous other lots in said district were shown to be unequally, inequitably and unjustly assessed to such an extent that the said Board of Supervisors declared that it would take up so much of their time to properly equalize said assessments that they could not afford to do so, as they were not receiving sufficient salary for such labor, and thereupon the said as-

sessments upon the various parcels of property in said East Denver park district were referred back to said Park Commission.

That the said Park Commission, upon receiving said proposed assessments back from said Board of Supervisors, for the purpose of re-assessing the same, according to benefits, merely pretended to do so, and proceeded to make a slight change in only one assessment of one particular individual, and then referred said assessments back to said Board of Supervisors, and the said Board of Supervisors, again pretending to act as a Board of Equalization, proceeded to adopt the same, and thereupon the council did pass said ordinance, hereinbefore set out, known as ordinance No. 3, series of 1913, purporting to levy each and all of said assessments so returned by said Park Commission against all of the property included in said East Denver park district, including the properties of the plaintiffs, and that each and all of the said acts and doings on the part of the said Park Commission and on the part of the said Board of Supervisors, thus pretending to act as a Board of Equalization, were and are contrary to the Constitution of the State of Colorado, and were and are such as to constitute a taking of property without due process of law, and contrary to the Constitution of the United States of America.

76 That these plaintiffs are informed and believe, and upon information and belief allege that in the proceedings by the city authorities, to prevent, hinder and make ineffectual the protests against the said assessment, there was actual fraud in that in divers instances, property owners of the said City and County, who had the right to protest, and whose joining in the protest against the said assessment, would have prevented the same, notwithstanding the said pretenses in the complaint mentioned, were paid by said City and County, large sums of money for their property, without any purpose so ever except to bribe said property owners into withdrawing or failing to file, protests against said plan, scheme and purpose, some of which sums of money were paid by addition to price over and above the just and fair value of the property acquired, and in some instances property was acquired and paid for many times in excess of its actual value, and for purposes not included in the general plan, or within the scope of the general plan for establishing parks, and parkways, and the said property added to the said scheme, and that thereby the cost of the property acquired was increased about one-third, and this additional cost is included in the pretended assessment for special benefits now attempted to be levied against the property of these plaintiffs and others similarly situated.

That the said Park Commission never selected the real estate, the cost of which is now attempted to be assessed against the property of these plaintiffs and others similarly situated, as assessments for special benefits, and never took the steps and measures for the acquisition of such real estate, which were required by law; that no notice to property owners of the so-called East Denver Park District was ever given by the said Park Commission, in connection with the supposed acquisition of the said real estate, or the establish-

ment of the same as public parks and parkways, and that no such notice was ever published as is required by the Charter of said
77 City and County, and that no such notice was ever published in accordance with the requirements of the said Charter.

That a remonstrance, subscribed to by the owners of twenty-five per cent, in area, of the real estate, now sought to be taxed for the cost of acquiring and establishing the said so-called parks and parkways, was filed within the time limited by law, with the Secretary of the said Park Commission and that thereafter the said City and County had no authority to proceed with the said pretended and so-called acquisition, or with the pretended ascheme and purpose mentioned.

That the cost of acquiring the said real estate for the said supposed parks and parkways was never definitely determined, and that the said Park Commission never did, duly or at all, certify or file with the Clerk of the said City and County, a statement showing the particulars as required by Sections 328 and 298 of the Charter of said City and County or apportioning said supposed cost upon each lot or tract of land now attempted to be assessed for the same, in proportion to the supposed benefits accruing or resulting to each piece, by reason of the acquisition and establishment of the said parks and parkways, as provided by the said Charter or otherwise.

That the Clerk of the said City and County never, duly or at all, notified the owners of the real estate which it is proposed should be assessed, as provided in said Charter, or otherwise.

That no opportunity was ever given to the property owners against whom it is now proposed to assess the supposed cost of acquiring and establishing said supposed and so-called parks and parkways, under the guise of special benefits, to appear before any board authorized to hear and determine complaints and objections concerning the pretended assessments.

That the said pretended assessments, by the said ordinance pretended to be levied, assessed and made against the property of these plaintiffs and each of them, is outrageous, unjust, confiscatory,
78 and without regard soever to any supposed benefit that might possibly accrue to them or either or any of them, or to their said several respective properties or any of them.

That the said pretended assessments are attempted to be made upon the property of these plaintiffs and others in a similar situation, without ratio, proportion, scheme or plan; that the said pretended benefits are purely guess work, chimerical and have no reasonable proximation, and that the assessments attempted to be levied against said property have not been arrived at through any conceivable scheme of benefit that any property might now, or hereafter, or at any time, derive from the acquisition of said lands, and the pretended establishment of the same for the pretended purposes mentioned.

That the said assessments are individual, favorable or unfavorable according to individual preference of the said City to respective owners; that the basis thereof is neither distance from said acquired lands, front foot, area, nor value, nor is there any other criterion by which the justice or reasonableness thereof, or the pretended benefits can be measured.

That all of the pretended assessments against the various parcels of property included in the said East Denver park district are greatly in excess of any benefits that might accrue to said property by reason of the establishment of said Civic Center; that the jurisdiction of the Park Commission of the City and County of Denver is limited to parks, boulevards and parkways; that the establishment and acquirement of said Civic Center under the guise of a park was and is a mere subterfuge; that the said Civic Center is not a park nor a boulevard nor a parkway, but is simply a proposed beauty scheme, wholly outside of the jurisdiction of the Park Commission of the City and County of Denver, and that no authority whatsoever exists in the charter of the City and County of Denver, or under the laws of the Sta'e of Colorado for the establishment or acquirement by the City and County of Denver of lands
79 for such a Civic Center and that all of the acts of the municipal authorities of the City and County of Denver, including the said Park Commission, for the acquirement and establishment of said Civic Center, were and are void and of no effect, and that the attempt of the said Park Commission to assess all property owners in the East Denver park district for the expense of purchasing and acquiring lands for the said Civic Center were and are wholly without their jurisdiction and each and all of said assessments are null and void and of no force and effect in law.

That the charter of the City and County of Denver provides that the Board of Supervisors, when sitting as a Board of Equlization, if they find that said assessments have not been properly levied, that they refer said matters back to the Park Commission, and that said Board of Supervisors does not sit as a Board of Equalization, and have no authority except to refer the matters to another Board, which has already acted upon said proposition. Said section being No. 300, Article I, which reads as follows:—

"Supervisors Hear Complaints—Council Assess Cost. Section 300. At the meeting specified in said notice, or any adjournment thereof, the Board of Supervisors sitting as a Board of Equalization, shall hear and determine all such complaints and objections, and may recommend to the Board of Public Works any modification of their apportionments; the Board of Public Works may thereupon make such modifications or changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the cost of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

That by the above charter provision, no power to grant relief is given to the Board of Supervisors, when sitting as a Board of Equalization, and said meeting of said Board of Supervisors sitting as a Board of Equalization, is a farce and a travesty on justice, and all of the acts of said body are void and illegal, and that said hearing by said Board of Supervisors, sitting as a Board of Equalization, is not and does not constitute due process of law under the constitution of the United States.

80 That the said Henry Farncomb is the owner of Lots Fourteen (14) to Eighteen (18) inclusive, Block Seventy (70) Case & Ebert's Addition to Denver: that the pretended assessment against said lots for the said pretended special benefit is the sum of One hundred Ninety-seven and 64/100 ($197.64) Dollars; that the said Henry Farncomb is the owner of Lots Seventeen (17) and Eighteen (18) Block One Hundred Sixty-six (166) South Division of Capitol Hill Addition to Denver; that the said pretended assessment against the said lots for the said pretended special benefits is the sum of One Hundred Fifty-seven and 80/100 ($157.80) Dollars: that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the same vicinity for the same street frontage and equal area, and which, if there could be any special benefit whatsoever, would be benefitted to a greater extent and in a higher sum than said lots mentioned, and that the said pretended assessment against said lots is upon a different plan by a different ratio and in a different proportion from the pretended assessment for the same properties and other lots similarly situated by other persons and corporations.

That the said Emma Donahue is the owner of Lots Twenty-three (23) and Twenty-four (24) Block One Hundred Fifty-three (153) Styles Addition, said property being situated in the City and County of Denver, State of Colorado; that the pretended assessment against said lots for said pretended special benefits is the sum of Ninety-five and 26/100 ($95.26) Dollars; that the said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the same vicinity for the same street frontage and equal area, and which, if there could be any special benefit whatsoever, would be benefitted to a greater extent and in a higher sum than said lots mentioned, and that the

81 said pretended assessment against said lots is upon a different plan by a different ratio and in a different proportion from the pretended assessment for the same properties and other lots similarly situated owned by other persons and corporations.

That the said Henry Lorie is the owner of Lots Seventeen (17) to Twenty-one (21) inclusive, Block Seventy-three (73) Case & Ebert's Addition, said property being situated in the City and County of Denver, State of Colorado: that the said pretended assessment against the said lots for the said pretended special benefits is the sum of Two Hundred Twelve and 50/100 ($212.50) Dollars; that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the same vicinity for the same street frontage and equal area, and which, if there could be any special benefit whatsoever, would be benefitted to a greater extent and in a higher sum than said lots mentioned, and that the said pretended assessment against said lots is upon a different plan by a different ratio and in a different proportion from the pretended assessment for the same properties and other lots similarly situated owned by other persons and corporations.

That the said M. N. Campbell is the owner of Lot Three (3) and Fifteen (15) feet of Lot Two (2) in Block Three (3), Kountze Addition, said property being situated in the city and County of Denver, State of Colorado; that the pretended assessment against the said lots for the said pretended special benefits is the sum of Sixty-seven and 12/100 ($67.12) Dollars; that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the same vicin-
82 ity for the same street frontage and equal area, and which, if there could be any special benefit whatsoever, would be benefitted to a greater extent and in a higher sum than said lots mentioned, and that the said pretended assessment against said lots is upon a different plan by a different ratio and in a different proportion from the pretended assessment for the same properties and other lots similarly situated owned by other persons and corporations.

83 That the said Westminster Mortgage Company is the owner of Lot 10, Block 2, Scherer's Addition to Denver. That the pretended assessment against the said lot for the said pretended special benefits is the sum of $37.37. That said pretended assessment against said lot greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lot mentioned; and that the said pretended assessment against said lot is upon a different plan, by a different ratio, and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said Theresa Jarecki is the owner of Lots 1, 2 and 3, in Block 1, Brown's Park Addition. That the said pretended assessment against the said lot 1 for the said pretended special benefits is the sum of $67.55, and against said lots 2 and 3 $48.26 each; that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion than the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said E. F. Crary is the owner of Lots 3 and 4, Block 172, East Denver. That the pretended assessment against the said lot 3 for the said pretended special benefits is the sum of $555.46, and against the said lot 4 the sum of $504.96; that said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which

if there could be any special benefit whatsoever would be
84 benefitted to a greater extent and in a higher sum than the
said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion than the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said E. F. Creary is and at all times in the complaint and herein mentioned was a citizen of the State of California, and that the said Lots 3 and 4, Block 172, are by the said attempted pretended assessment attempted to be taxed and made to bear and answer for a larger sum in proportion to the costs of the said so-called improvement than is property similarly situated belonging to citizens of the State of Colorado; and that by the said pretended and so-called assessment the said E. F. Creary is denied the privileges and immunities of a citizen of the State of Colorado, and of the United States.

That the said K. D. O'Donnell is the owner of Lots 17, 18 and 19, Block 224, Clement's Addition, and that the pretended assessment against said lots for the said pretended special benefits is the sum of $42.27. That the said pretended assessment against said lots greatly exceeds in amount the assessments of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion than the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said K. D. O'Donnell is the owner of Lots 10 and 11, Block 326, Capitol Avenue Subdivision, and that the pretended assessment against the lots for the said pretended special benefits is the sum of $26.30 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with
the same street frontage and equal area, and which if there
85 could be any special benefit whatsoever would be benefitted
to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said K. D. O'Donnell is the owner of Lots 14, 15 and 16, Block 23, Wyman's Addition to the City of Denver; and that the pretended assessment against said lots for the said pretended special benefits is the sum of $67.32 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to

a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said K. D. O'Donnell is the owner of Lots 11 and 12, Block 7, Whitsitt's Addition to the City of Denver; and that the pretended assessment against the said lots for the said pretended special benefits is the sum of $75.89 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said lots last mentioned are situated in the portion of said City and County of Denver which lies due south of the said
86 land so acquired and pretended to have been laid out as a public park, and herein mentioned and referred to as the Civic Center. That the business district of the said City of Denver lies to the north and northerly of the said land so acquired. That the purpose of the acquisition of the said land and the pretended laying out of the same as a public park was as herein aforesaid, to restrict and confine the business district of said City to the north of the said land so acquired, and to prevent the same from spreading over and going into property to the south thereof; and the said purpose was and is to prevent the said lots in said Whitsitt's Addition from becoming business property, and to restrict and confine the same to residence purposes. That the said property is residential property of a cheap class, and does not produce any income, and cannot now be made to produce any considerable or adequate income upon its value. That until the establishment of the said so-called Civic Center, and the acquisition of said land for the purpose of establishing the same herein referred to, the said property had greater actual value by reason of a just expectancy that said business district of said city would shortly spread so as to include the said proprety; and that the result of the acquisition of said land for the purposes for which it was acquired, and of the scheme and plan, has been and is to actually damage said lots in Whitsitt's Addition in a very large sum of money; that the actual damage thereto greatly exceeds the amount attempted to be assessed as special benefits against the same, and that the said pretended improvement is and will continue to be an actual damage and detriment to the said property and not a benefit.

That the said T. J. O'Donnell is the owner of the South 1/2 of Lot 11, and of Lots 12 and 13, Block 23, Wyman's Addition to the City of Denver, and that the pretended assessment against the said lot 11 for the said pretended special benefits is the sum of $67.31

(the said lot being assessed as a whole lot, no assessment being made against said one-half lot); and against said lots 12 and 13 the sum of $67.31 each. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned
87 by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against the said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said T. J. O'Donnell is the owner of Lots 30 and 31 and the South 1/2 of Lot 32, John S. Flower's Addition to Block 65, Porter's Addition to Denver; and that the pretended assessment against said Lot- 30 and 31 for the said pretended special benefits is the sum of $105.24 each; and against said Lot 32 the sum of $105.24, said lot being assessed as a whole lot. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio, and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger are the owners of Lots 9 to 14, both inclusive, Block 35, of the Town of Swansea; and that the pretended assessments against the said lots for the said pretended special benefits is the sum of $5.27 each. That the said pretended assessments against the said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefits whatsoever would be benefitted to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different
88 plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That the said M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger are the owners of Lots 27 and 28, Block 48, First Addition to Swansea; and that the pretended assessment against the said lot 27 for the said pretended special benefits is the sum of $6.56, and against said Lot 28 the sum of $7.39. That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the immediate vicinity with the same street frontage and equal area, and which if there could be any special benefit whatsoever would be benefitted

to a greater extent and in a higher sum than the said lots mentioned; and that the said pretended assessment against said lots is upon a different plan, by a different ratio and in a different proportion from the pretended assessment for the same purpose of other lots similarly situated owned by other persons and corporations.

That said Block- 35 and 48 lie about five miles in a northeasterly direction from the said so-called Civic Center and the property acquired for the purposes thereof as in the complaint and herein mentioned, and are separated from the main portion of the said City of Denver and from the portion in which the said land so acquired is situated by the trunk lines of a number of the principal railroads entering the City of Denver. That said lots have no value except for manufacturing or trackage purposes. That there is no homogen-ous connection or relation between the neighborhood in which said lots are situated, and that for the pretended benefit of which the said land has been acquired; and that the attempted inclosure of said lands in the said park district was and is arbitrary and unreasonable, and that the said pretended assessment against the said lots and each of them is for the reasons in this paragraph given, in addition to the general reasons herein alleged, illegal and confiscatory; and that the said pretended assessment when added to other assessments for special benefits and the general taxes recently laid against the same by the said City and County of Denver amounts to
89 the confiscation of the said property and exceeds the value of the said lots.

That the said proceedings on their face purport to be made by the municipal authorities under the charter of said City and County of Denver, and pretend to make a legal and valid assessment; that by said alleged assessing ordinance, liens and clouds are cast upon the property of th-se plaintiffs, and if injunctive relief is not granted, these plaintiffs will be without any remedy in the premises; that defendants assert that the said so-called assessments are liens and claims for the amounts respectively set forth in said pretended assessing ordinance against the said lots and lands of the so-called East Denver park district, and if unrestrained by this court they will be a perpetual lien against the lots and lands of the respective plaintiffs in the respective amounts assessed against the respective lots, pieces and parcels *and parcels* of land above mentioned, belonging to the plaintiffs aforesaid, and that said defendants will attempt to collect said so-called assessments in the manner and form as set forth in said charter and stated for the collection of special assessments, and the defendant Treasurer threatens to, and will, advertise the respective lots, pieces and parcels of land above mentioned and more particularly described as belonging to the plaintiffs, severally and respectively, for sale, and sell the same for the amount of the so-called special assessments, unless said assessments are paid; that there is nothing due or owing from the plaintiffs herein, or any of them, on their said property, and nothing due therefor on account of or for the proposed Civic Center and said proposed park, and that the pretended liens claimed upon the respective properties of the plaintiffs, on account of the matters and things herein mentioned, and by *the*

virtue of the alleged assessing ordinance, in truth and in fact are illegal and void.

That if the sale is made under and by virtue of the laws of the State of Colorado, then unless the amounts of said assessments, together with interest and penalties, added thereunto, are paid,
90 tax deeds will issue to the purchasers at said sale, which by the laws of the State of Colorado, are made prima facie evidence of the regularity of the proceedings and doings in that *the* behalf.

That the said plaintiffs are without any adequate legal remedy in the premises; that any legal remedy they might resort to, if any there might be, would be dilatory inadequate, incomplete and uncertain, and would require a great multitude of suits and would not afford to plaintiffs that speedy remedy granted by section 6 of the Bill of Rights of the constitution of the State of Colorado.

That plaintiffs further allege that the said pretended assessment is no assessment at all, but is clearly null and void and of no force and effect, and that the actions and things therein alleged to have been done by said officers of said municipality, or any of said officers, were not the acts of said officers, but simply the lawless, unauthorized and illegal acts and doings of the same as individuals, and plaintiffs claim and allege the facts to be that there is nothing due or owing legally, morally or otherwise from them or any of their property in the City and County of Denver, and that there never was a valid lien or claim against them, or any of them, and that said assessments are wholly illegal and void, and whatever there is due, if anything might be due, is so mixed up and confused with claims which are absolutely illegal, void, and excessive, that it is impossible to determine the amounts proximately or at all.

That the plaintiffs have no plain, adequate and speedy remedy at law or otherwise than by this action, in the premises.

Wherefore, Plaintiffs and each of them, pray for judgment against said defendants, and each of them, decreeing each, every and all of said assessments to be null and void; and in the meantime
91 that an injunction be issued out of and under the seal of this Honorable Court, directed to said defendants and each of them, restraining and enjoining them from in any manner enforcing or collecting said assessments, or attempting to enforce or collect the same, practically in so far as the same relate to any of the lots or parcels of land belonging to these plaintiffs or any of them; that the ex-officio Treasurer be restrained from advertising the sale of plaintiffs' properties or any of them, or attempting to do so, and from clouding the title of the plaintiffs or any of them to any of the lots, pieces or parcels of land above mentioned, or from interfering or molesting the plaintiffs, or any of them, in the use and enjoyment of any of the properties above mentioned, until the further order of this Court, and pending the final determination of the validity of said alleged assessments; that the cloud or lien of the said assessment be removed, and the said assessments declared and decreed null and void and of no force or effect as applied to these plaintiffs, or any of the property above mentioned; and the plaintiffs

ask for such other and further relief as to this Court may seem meet and proper, and judgment for their costs.

OMAR E. GARWOOD,
BERT MARTIN,
T. J. O'DONNELL,
Attorneys for Plaintiffs.

92 STATE OF COLORADO,
City and County of Denver, ss:

Henry Lorie, of lawful age, being first duly sworn, doth depose and say:

That he is one of the plaintiffs in the above entitled cause; that he has read the foregoing amended complaint, and knows the contents thereof; and that the matters and things therein contained are true of his own knowledge, except as to those things stated to be upon information and belief, and as to those things, he believes them to be true.

(Signed) HENRY LORIE.

Subscribed and sworn to before me this 2nd day of January, A. D. 1915.

My commission expires August 14th, 1917.

[NOTARIAL SEAL.] JOHN VAN RIPER,
Notary Public.

93 Thereafter, and on, to-wit, the 11th day of January, 1915, an order was entered, pursuant to stipulation filed herein, substituting as defendants, in place of Henry J. Arnold, as Mayor of the City and County of Denver, John S. Macbeth, W. W. Porter, W. N. Downing, E. W. Robinson and Thomas B. Long, as members of the park commission of the City and County of Denver, John S. Macbeth, as president of the park commission, Otto Thum, as Clerk of the City and County of Denver, Allison Stocker, as Treasurer of the City and County of Denver, and Clair J. Pitcher, as Assessor of the City and County of Denver, Alexander Nisbit, as Commissioner of Safety, John B. Hunter, as Commissioner of Improvements, J. M. Perkins, as Commissioner of Social Welfare, Clair J. Pitcher, as Commissioner of Finance, and Otto Thum, as Commissioner of Property, of the City and County of Denver.

Thereafter, and on, to-wit, the 1st day of March, 1915, the defendants filed their motion to strike said amended complaint from the files of this cause, which said motion, omitting caption, is in words and figures as follows, to-wit:

Motion to Strike Amended Complaint.

Somes now the defendants above named, by their attorneys I. N. Stevens, G. Q. Richmond and J. H. Moore, and respectfully move this Honorable Court to enter an order herein striking from the files in the above entitled cause the so-called Amended complaint

of plaintiffs heretofore filed herein; and as grounds for said motion state:

First. That said so-called amended complaint does not contain any allegations of new or different facts or circumstances which existed at the time of the filing of the original complaint
94 herein, and which were either defectively plead in or omitted from the allegations of the original complaint, and does not state any different or other allegations sufficient to perfect a right of action existing in the original plaintiffs at the time of the filing of the original complaint herein.

Second. That the said so-called amended complaint does not seek to amend a complaint and petition in which an existing right of action is either defectively or insufficiently stated, but on the contrary seeks to amend an original complaint, the allegations of which are binding upon and have been adopted by the plaintiffs herein joined by petition as parties plaintiff; and which said complaint wholly fails to state a cause of action because of positive and affirmative allegations under oath therein contained.

Third. That said so-called amended complaint by affirmative allegations positively contradicts and denies detailed material allegations of fact which appear affirmatively pleaded and admitted under oath in said original complaint herein, there being no showing made, or attempted to be made by plaintiffs advising this Court of the reason or reasons for such allegations positively denying allegations theretofore admitted by plaintiffs in said verified original complaint.

The particular allegations above referred to, in the original complaint, appear in paragraphs 14 and 15 thereof; the allegations contradicting these statements appear on page 11 of the so-called amended complaint; said allegations being with reference to
95 the notice of hearing of protests against the proposed assessments to be levied against property owners and property in the East Denver park district for the purpose of carrying out the "Civic Center" project.

Fourth. That *be* the ellegations contained in said so-called amended complaint, there is attempted to be set up a new and different cause of action from that attempted to be alleged in the original complaint, and a cause of action which by virtue of affirmative allegations in the original complaint did not exist in the original plaintiffs in this action, when said original complaint was filed herein.

That said new cause of action attempted to be set forth in said so-called amended complaint consists in a denial that a notice was given pursuant to and in conformity with the provisions of the charter of the City and County of Denver; that the Board of Supervisors, sitting as a Board of Equalization, would hear and determine protests against the assessments proposed to be made against property in East Denver park district, for the purpose of carrying out the Civic Center plan, which said notice was positively and affirmatively alleged in said original complaint to have been given, thereby, if this amendment be permitted, changing materially the issues to be joined herein, the facts necessary to be proven, and the kind and

quantity of evidence necessary to be adduced, the nature and manner of the defense, and creating a new cause of action such as is inhibited by law.

I. N. STEVENS,
G. Q. RICHMOND,
J. H. MOORE,
Attorneys for Defendants.

96 Thereafter, and on, to-wit, the 24th day of May, 1915, after argument of council, said motion was denied by the court, to which ruling of the court, the defendants then and there, by their council, excepted.

Thereafter, and on, to-wit, the 23rd day of June, 1915, the defendant- filed their demurrer to said amended complaint, which said demurrer, omitting the caption thereof, is in words and figures as follows:

"Comes now the defendants above named, by their attorneys, James A. Marsh, G. Q. Richmond and J. H. Moore, and demur to the amended complaint of the plaintiffs filed herein, on the ground that it fails to state facts sufficient to constitute a cause of action against said defendants, or any of them, for the reasons more particularly as follows:

"First. The amended complaint fails to state that the
97 plaintiffs, or any of them, filed with the clerk of the City and County of Denver a protest against the amount of their assessments, and failed to appear before the board of supervisors sitting as a board of equalization, or to demand a hearing before said board; that because of said failure, they are estopped at this time to apply to a court of law or a court of equity to seek relief on account of acts of fraud alleged to have been committed by the Park Board and the Mayor in the preliminary proceedings leading up to the passage of the assessing ordinance.

"Second. The complaint fails to allege conspiracy, fraud or irregularity in the passing of said assessing ordinance, but merely charges fraud and irregularity in the primary and preliminary steps.

"Third. The complaint fails to show a sufficient allegation of the violation of any provision of the constitution of the United States or the State of Colorado.

"Fourth. The complaint clearly shows upon its face that the alleged conspiracy between the Park Board and the Mayor originated some time prior to August, 1909, and that by the exercise of reasonable care, the plaintiffs could and should have discovered said alleged conspiracy and fraud, as early as August, 1909; that therefore as to all allegations of fraud, the complaint is demurrable, because of section 4638 of the Revised Statutes of 1908, which provides that bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved parties, and not afterwards.

"Fifth. Assuming that there has been a violation of the constitution of the State and the constitution of the United States, and that the said assessment constituted the taking of plaintiffs' property

without due process of law, plaintiffs are nevertheless estopped
98 to assert the unconstitutionality of said assessing ordinance and the charter provisions authorizing the same, because they have failed to file a notice protesting against said assessments with the clerk and to appear before the board of equalization as required by the Charter.

"Sixth. The City and County of Denver has the power in the manner and form provided by the Charter to acquire real estate for park purposes, and to issue bonds in payment therefor without a vote of the qualified tax-payers of the City authorizing the issuance of any of said bonds.

"Seventh. As to all matters alleged in the complaint charging irregularities in the preliminary proceedings — the Charter provisions, section 303 is clear- a bar. Said section reads as follows:

" 'All assessments made in pursuance of this article shall be due and payable within thirty days of the assessing ordinance without demand, provided that all such assessments may at the election of the owners be paid in installments with interest as hereinafter provided. Failure to state the whole assessment within said period of thirty days, shall be conclusively considered and held an election on the part of all persons interested * * * or to pay in such installments all persons so electing * * * shall be conclusively held and considered as a waiver of hearing and all rights to question of power or jurisdiction of the City to construct the improvements, quality of the work, irregularity or sufficiency of the proceedings or the validity or correctness of the sum assessed.'

Thereafter, and on, to-wit, the 28th day of June, 1915, the court sustained said demurrer to said amended complaint, to which ruling of the court the plaintiffs by their counsel then and there duly excepted.

Whereupon the plaintiffs elected to stand upon their said amended complaint, and the court did rended and enter judgment, dismissing this action, and for costs, to the rendering and entry of which
99 judgment the plaintiffs by their counsel then and there duly excepted.

Assignments of Error.

Now come the plaintiffs, by Omar E. Garwood, Bert Martin and T. J. O'Donnell, their attorneys, and say that in the record proceedings and judgment aforesaid there is manifest error, in this, to-wit:

1. That the said court erred in sustaining the demurrer of the defendants to the amended complaint.

2. That the said court erred in entering judgment for the defendants and against the plaintiffs.

OMAR E. GARWOOD,
BERT MARTIN,
T. J. O'DONNELL,
Attorneys for Plaintiffs.

Approved August 6, 1915.
J. A. MARSH,
G. Q. RICHMOND,
J. H. MOORE,
Attorneys for Defendants.

Certificate of Judge.

I, the undersigned, Judge of the second division of the District Court sitting within and for the City and County of Denver, do hereby certify that I have considered the above and foregoing statement of record on error, and that the same is true, complete, and properly prepared, and is hereby approved.

Witness my hand this 12 day of August, 1915.
JOHN H. DENISON, *Judge.*

100 STATE OF COLORADO,
City and County of Denver, ss:

In the District Court of the Second Judicial District of the State of Colorado.

I, J. Sherman Brown, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be the original record certified and filed in cause No. 55316, Henry Farncomb, et al., Plaintiffs and The City and County of Denver, etc. defendants, wherein the Honorable John H. Denison was Trial Judge.

Witness my hand and seal of said Court, at the Court House in Denver, County and State aforesaid, this 27th day of August, A. D. 1915.

J. SHERMAN BROWN, *Clerk.*

Filed in District Court City & County of Denver, Colo. Aug. 27, 1915.

[SEAL.] J. SHERMAN BROWN.

8747. Filed in the Supreme Court of the State of Colorado Aug. 28, 1915. James R. Killian, Clerk.

101 And afterwards, and on, to-wit, the following proceedings were had and entered of record in the Supreme Court in this matter:

Monday, January 7th, 1918.

Court reconvened at ten o'clock A. M. Sitting en Banc.

Present: Honorable S. Harrison White, Chief Justice; Honorable William A. Hill, Honorable James E. Garrigues, Honorable Tully Scott, Honorable James H. Teller, Honorable Morton S. Bailey, and Honorable George W. Allen, Associate Justices; Honorable Leslie E. Hubbard, Attorney General; Mr. James R. Killian, Clerk, and Mr. William T. Heiskell, Bailiff.

Whereupon the following proceedings were had and done, to-wit:

8747.

HENRY FARNCOMB et al., Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER et al., Defendants in Error.

Error to the District Court of the City and County of Denver.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said

102 District Court,

It is hereby ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings according to law, as shall be necessary to the final execution of the said judgment *if* said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that said defendants in error do have and recover of and from said plaintiffs in error their costs in this court expended, to be taxed.

And the opinion of the Court is in words and figures following, to-wit:

103 No. 8747.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, M. N. CAMPBELL, The Westminster Mortgage Company, a Corporation; Theresa Jarecki, E. F. Creary, K. D. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger, and I. Singers-Bigger, for and on Behalf of Themselves and All Other Taxpayers of the City and County of Denver Similarly Situated and Interested, Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; Alexander Nisbet, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property, and James F. Markey, as Auditor of said City and County, Defendants in Error.

Error to the District Court of the City and County of Denver.

Hon. John H. Denison, Judge.

Mr. Omar E. Garwood, Mr. Bert Martin, Mr. T. J. O'Donnell, Mr. J. W. Graham, Mr. Canton O'Donnell, of counsel, for Plaintiffs in Error.

Mr. James A. Marsh, Attorney for the City and County of Denver; Mr. Henry A. Lindsley, Mr. Walter E. Schwed, of counsel, for Defendants in Error.

Mr. Justice BAILEY delivered the opinion of the Court.

104 In this action plaintiffs in error here, plaintiffs below, for themselves and others similarly situated, sought to have certain assessments against their properties declared null and void, and the City and County of Denver restrained from enforcing payment. The assessment alleged to be unlawful is that established by Ordinance No. 3, Series of 1913, of the City and County of Denver, for providing parks and parkways in the East Denver Park district. The ordinance sets out as done all the acts requisite to be done before the ordinance could be legally passed, and prima facie shows compliance with all the charter provisions under which the land was secured. The property affected by the ordinance is that comprising the East Denver Park District, the purpose being to provide funds for what is known as the "Civic Center," within such district. Plaintiffs contest the regularity of the preliminary steps leading to the passage of the assessing ordinance, and also contend that due process of law is not afforded by the hearing provided for before the board of supervisors, sitting as a board of equalization, since its action is not final, but advisory only.

A demurrer to the complaint was sustained and judgment of dismissal was entered accordingly, plaintiffs having elected to stand by their complaint and their cause as thereby made.

It is urged that section 300 of the Charter of the City and County of Denver does not provide due process of law for taxation purposes. The section is as follows:

"At the meeting specified in said notice, or any adjournment thereof, the Board of Supervisors sitting as a board of equalization, shall hear and determine all such complaints and objections and may recommend to the Board of Public Works any modification of their apportionments. The Board of Public Works may thereupon make such modifications or charges as to them may seem equitable and just, or may confirm the first apportionment, and shall notify
105 the council of their final decision; and the council shall thereupon by ordinance assess the cost of said improvement against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

It is argued that as the board of equalization thus established has power only to suggest or recommend alterations in the ass-ments, protestants are without remedy. This is set up as a question never before suggested, much less urged, in any of the several cases in which like Charter provisions have been construed, providing for the assessment and collection of funds for public improvements.

Section 300, supra, supersedes section 31 of the Charter of 1903, which makes similar provisions for hearing complaints, except that the City Council is designated as the equalization board to recommend changes in assessments to the board of public works. The constitutionality of section 31, was questioned in City of Denver v. Londoner, 33 Colo. 104, where plaintiffs contested the sufficiency of the petitions of the property owners of a paving district, the legality of the publication of the ordinance creating the district, the sufficiency of the published notice and the validity of the law creating the board of public works. It was further contended that due process of law was not provided by the Charter, and that certain specific tracts of land were not benefitted, and that the assessments were arbitrary and excessive. In substance, the same questions were raised in that case as are before us in this one. This court upheld the position of the City, and while the Supreme Court of the United States reversed that decision, it did so wholly upon a point which in no way affects any question herein involved. This case is ruled, therefore, by that case, except upon the point upon which it was reversed.
106 In discussing the inquiry whether the City Council, as a board of equalization, sitting for the purpose of hearing complaints and with power only to recommend relief, is a competent and constitutional tribunal, this court in City of Denver v. Londoner, supra, after discussing Brown v. City of Denver, 7 Colo. 305, said:

"It is urged that because the judgment of the city council is not final, but its action is subject to revision by the board of public works, that therefore it is not a competent tribunal. The word 'competent,' as employed in the Brown case, does not convey any such meaning, but, rather, that the tribunal which the law designates shall be suitable and legally qualified to act. It does not necessarily follow that the judgment of such tribunal must be final. The

main purpose of affording an owner a hearing upon the question of assessing his land for special benefits is to give him the opportunity to be heard upon the quantum of the tax which may be assessed upon his land, as well as its validity. If his hearing is afforded at some stage of the proceedings he is given the opportunity to be heard which the fundamental law contemplates." (citing Bauman v. Ross, 167 U. S. 548.)

Denver v. Kennedy, 33 Colo. 80, and Denver v. Dumars, 33 Colo. 90 were decided with Denver v. Londoner, supra, and in them other provisions relative to special improvement taxes and matters pertaining to the construction of the Charter provisions were determined, in favor of the City. The Supreme Court of the United States, in passing upon the constitutionality of the charter provisions, in Londoner v. Denver, 210 U. S. 373, decided that these provisions were sound and afforded due process of law. At page 380 that court said:

"The ninth assignment questions the constitutionality of that part of the law which authorizes the assessments of benefits. It seems desirable, for the proper disposition of this, and the next assignment, to state the construction which the Supreme Court gave to the Charter. This may be found in the judgment under review, and two cases decided with it. (Denver v. Kennedy, 33 Colo. 80; Denver v. Dumars 33 Colo. 90.) From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional assessment is certified to the city council, the land owners are afforded an opportunity to be heard upon the validity and amount of the assessment by the council, sitting as a board of equalization; if any further notice than the notice
107 to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made. This hearing provided for by sec. 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant.' (33 Colo. 97.) And that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself, therefore, is clear of all constitutional faults."

And at page 378:

"The State Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the State. The only question for this court is whether the charter provisions authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not."

And further, at page 380:

"The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found

as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding * * * Those interested therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of Paulson v. Portland, 149 U. S. 30, because there was an implied power in the city council to give notice of the time of hearing. We think the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it."

In Londoner v. The City and County of Denver, 52 Colo. 15, the allegations of the complaint are substantially the same as in this case. The Londoner suit was brought on behalf of the plaintiff and all others similarly situated in the East Denver Park District. It was alleged, as here, that the rules for apportioning the benefits were unreasonable and unjust; that there were irregularities, inconsistencies, conspiracy and fraud in the preliminaries relating to the notices, protests, remonstrances, and the permission given to some protestants to withdraw their objections. The question of the power of the City to acquire land except by bond issue regularly approved by the electors, and whether the Charter provisions provided due process of law, were also at issue. In that suit, as here, the cause was dismissed on demurrer. In disposing of the alleged lack of power in the municipality to acquire lands as provided in the Charter, this court, on page 24, after citing Hamilton on the Law of Special Assessments, sections 256, 257; and sections 307, 356 and 357 of Page & Jones on Taxation by Assessments, said:

"We therefore conclude that the people of the City and County of Denver, when making a provision for the municipality had the power to write therein provisions for the purchase of lands, or for the exercise of the power of eminent domain in acquiring lands for parks and parkways, and the payment therefor, in whole or in part, by collections arising from assessments made upon the property within the district specially benefitted by the improvements and that the charter provisions in that respect are constitutional.

"2. The charter provisoons authorize the board of park commissioners to initiate the public improvements in question, and to finally determine whether the land necessary therefor shall be acquired, subject, however, to the will of the owners of a certain percentage in area of the real estate to *the* assessed for the cost thereof, to annul that authority by expressing their disapproval of the proposed improvements within a designated time."

In reviewing the charter provisions relative to the acquirement of land for parks and parkways, the court, at page 29, said:

"The charter provisions, by the necessary implication, provide for

two adjudications of the facts as to the sufficiency of the notice given and the remonstrances filed. One, a direct hearing before the board of park commissioners. The other, in the nature of a review of that hearing by the city council. * * * It would seem that the action of the board of park commissioners in finally determining 'that said land shall be acquired for said purpose,' would, if it were not for the other provisions of the charter, be a conclusive determination that the property owners assented to the improvement. But, be that as it may, as the charter expressly declares that the findings of the council by ordinance as to such facts 'shall be conclusive in every court or other tribunal,' the duty to determine, as well as the conclusive effect of the determination of the city council, is fixed beyond doubt. Freeman on Judgments, sections 522, 523 and 524."

109

Plaintiffs in the case above cited asked for an injunction restraining the city council from passing the assessing ordinance. Prior to the determination of the suit on writ of error the ordinance was passed by the council. Upon this phase of the case this court, at page 36, held:

"The city council, in the exercise of the power vested in it by the Charter, and unrestrained by any existing authority, duly enacted an ordinance, declaring the existence of the essential facts. The ordinance has the effect of a statute; and the mandate of the people of the municipality, expressed through their charter, is that such findings shall be conclusive upon every court or other tribunal. * * * Under these circumstances, we certainly do not have the power to nullify the legislative mandate, that the findings of the council shall be conclusive upon every court or other tribunal, and declare it is not conclusive upon us."

Fraud was charged as to the preliminary proceedings of the park board, in practically the same terms as in the case at bar. As to this, the court, at page 40, held:

"We are fully persuaded that upon the record as here presented, a court of equity can grant no relief to plaintiff in error."

In the case at bar, the contention of plaintiffs in error that the constitutional questions attempted to be raised are new, and afford valid ground for annulling all the proceedings of the city in the matter, is without foundation. This question was settled in Londoner v. Denver 210 U. S., as shown by the quotation herein from page 380 of that opinion. As matter of fact, every contention made by plaintiffs in error is determined adversely to them by the rule of stare decisis, upon the authorities herein referred to, from which extracts are made.

110

The constitutionality of the provisions of the Charter as to hearing of complaints by the board of supervisors is not only settled by the rule of stare decisis, but is also res judicata, for in Londoner v. Denver, 52 Colo. 15, plaintiff brought suit upon behalf of himself and all others similarly situated in the East Denver Park District. Plaintiffs in error here were, and are, similarly situated, and they not only could have participated therein, but should have done so, and for this reason the judgment in that case is bind-

ing on them. Freeman on Judgments, 4th ed. 178; 2 Van Fleet's Former Adjudication, 568, 570; Clark v. Wolf, et al. 29 Iowa, 197, 207; State ex rel. Brown v. C. & L. R. R. Co., 13 S. C. 290; Lyman et al. v. Faris, et al., 53 Iowa, 498, 5, N. W. 621; Harmon v. Auditor etc., 123 Ill. 122, 13 N. E. 161, 163, 5 Am. St. Rep. 502; Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Ashton v. City of Rochester, 133 N. Y. 187, 30 N. E. 334, 28 Am. St. Rep. 619, 623; 23 Cyc. 1269.

It is admitted that plaintiffs in error had ample time after lawful notice given to present their complaints and objections to the proper board, but failed and refused to do so. Under the authorities they cannot now be heard to question any of the acts of the City and County of Denver in the premises. Fox v. Lipe, 14 Colo. App. 259; Pipe v. Smith, 5 Colo. 146; Walker v. Pogue, 2 Colo. App. 109; The judgment of the lower court should be affirmed, and it is so ordered.

Decision en Banc.

Mr. Justice Teller and Mr. Justice Hill agree with the conclusion.

Mr. Justice Scott not participating.

111 And afterwards, and on, to-wit, the 6th day of February, A. D. 1918, plaintiffs in error filed a petition for rehearing in said Supreme Court, in the words and figures following, to-wit:

No. 8747.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, M. N. CAMPBELL, The Westminster Mortgage Company, a Corporation; Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger, and I. Singers-Bigger, for and on Behalf of Themselves and All Other Taxpayers of the City and County of Denver Similarly Situated and Interested, Plaintiffs in Error,

v.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; ALEXANDER NISBET, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property, and James F. Markey, as Auditor of said City and County of Denver, Defendants in Error.

Petition for Rehearing.

Come now the plaintiffs in error, and petition the Court to withdraw and vacate the former opinion filed herein, and grant the plaintiffs in error a rehearing for the following reasons, to-wit:

1. Because the opinion is in error in stating and holding,

(*a*) That the question whether Section 300 of the charter in question provided for such a hearing of complaints and objections as to

correctness of the charges made as to constitute due process of
112 law has been decided in favor of the City by the Supreme Court of the United States in Londoner v. Denver, 210 U. S. 373.

(*b*) That the opinion of this Court in Denver v. Londoner, 33 Colo. 104-111, was affirmed in the case mentioned, supra.

2. Because the opinion is in error in stating and holding that it is claimed by the plaintiffs in error that "this is set up as a question never before suggested, much less urged."

3. And in other matters apparent.

Respectfully submitted,

OMAR E. GARWOOD,
BERT MARTIN,
T. J. O'DONNELL,
Attorneys for Plaintiffs in Error.

J. W. GRAHAM,
CANTON O'DONNELL,
Of Counsel.

113 And afterwards, and on, to-wit, the 4th day of March, A. D. 1918, the following proceedings were had and entered of record in the Supreme Court in this matter:

8747.

HENRY FARNCOMB et al., Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER et al., Defendants in Error.

Error to the District Court of the City and County of Denver.

The Court having considered the arguments of counsel upon the petition for rehearing, and being now well advised in the premises, doth order that said petition be, and the same is hereby, denied.

114 In the Supreme Court of the State of Colorado.

No. 8747.

HENRY FARNCOMB et al., Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants in Error.

Authentication of Record.

SUPREME COURT,
State of Colorado, ss:

I, James Perchard, Clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 114, are a true, full and com-

plete transcript of the record and proceedings in the case of Henry Farncomb et al., plaintiffs in error, and The City and County of Denver, a municipal corporation et al., defendants in error, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

[Seal Supreme Court, State of Colorado.]

JAMES PERCHARD,
Clerk Supreme Court of Colorado,
By A. H. WHITE,
Deputy Clerk.

115 In the Supreme Court of the State of Colorado.

No. 8747.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, M. N. CAMPBELL, The Westminster Mortgage Company, a Corporation; Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger, for and on Behalf of Themselves and All Other Tax-payers of the City and County of Denver Similarly Situated and Interested, Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; ALEXANDER NISBET, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property, and James F. Markey, as Auditor of said City and County of Denver, Defendants in Error.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled case, the plaintiffs in error hereby pray a writ of error from said decision and judgment to the United States Supreme Court and an order fixing the amount of a cost bond.

Assignments of error herewith.

T. J. O'DONNELL,
BERT MARTIN,
OMAR E. GARWOOD,
Attorneys for Plaintiffs in Error.

Filed in the Supreme Court of the State of Colorado Mar. 23, 1918. James R. Killian, Clerk.

116 STATE OF COLORADO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by or in behalf of the plaintiffs in error in the sum of three hundred dollars, such bond being for cost only and not to act as a supersedeas.
Dated March 23, 1918.

WM. A. HILL,
Chief Justice Supreme Court of Colorado.

Filed in the Supreme Court of the State of Colorado Mar. 23, 1918. James R. Killian, Clerk.

117 Filed in the Supreme Court of the State of Colorado Mar. 23, 1918. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 8747

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, M. N. CAMPBELL, The Westminster Mortgage Company, a Corporation; Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger, for and on Behalf of Themselves and all Other Taxpayers of the City and County of Denver Similarly Situated and Interested, Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation; ALEXANDER NISBET, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property, and James F. Markey, as Auditor of said City and County of Denver, Defendants in Error.

Assignments of Error.

Now come the above named plaintiffs-in-error and file herewith their petition for a writ of error and say that there are errors in the record and proceedings in the above entitled case; and for the purpose of having the same reviewed by the Supreme Court of the United States make the following assignments of error:

The Supreme Court of Colorado erred in holding and deciding that section 300 of the charter of the city and county of Denver provides for due process of law, for taxation purposes. The validity of said section was denied and drawn in question by the plaintiffs in error on the ground that the same is repugnant to the constitution of the United States and in contravention thereof.

118 The said errors are more particularly set forth as follows:

The Supreme Court of Colorado erred in holding and decidings,

First. That said section 300 and the other sections of said charter relating to the said subject matter, to-wit: the making of special assessments upon real estate to pay for parks and parkways, furnished to and provided for the plaintiffs in error and others in a similar situation an opportunity to be heard with respect to the said assessments laid upon and levied against their said several pieces and parcels of real estate, respectively, before a tribunal suitable, legal, qualified, competent and having jurisdiction to act; i. e., constitutes due process of law with respect to the said several special assessments.

Second. That the said charter of the city and county of Denver does not provide for the taking of the property of the plaintiffs in error and others similarly situated without due proces of law.

Third. That the said charter of the city and county of Denver does not provide for the levying of special assessments against the property of the several plaintiffs in error and others similarly situated, under the pretense and claim that the said several properties of the said several plaintiffs in error and others similarly situated are specially benefited; and for making the said several assessments a lien upon the said several pieces of property of the said several plaintiffs in error and others similarly situated and that, if the said several

119 assessments were not paid, the said several pieces of property of the said several plaintiffs in error and others similarly situated shall be sold to pay the said several sums assessed against the said several pieces of property respectively without affording the said several plaintiffs in error and others similarly situated an opportunity to be heard as to or upon the question of whether or not the property so assessed is specially benefited and as to whether or not, in case the said several pieces of property of the said several plaintiffs in error are specially benefited, whether the amounts assessed against the said several pieces of property respectively were the just proportions or amounts which the said several plaintiffs in error or their respective several properties ought to pay upon or towards the supposed improvement, to-wit: the acquisition of said land for parks and parkways and the establishment of such parks and parkways; and in holding and deciding that the said charter of the city and county of Denver provides the said several plaintiffs in error and others similarly situated with an opportunity to be heard respecting the said matters that amounts to, constitutes and is due process of law.

Fourth. That the method and manner of providing for. making and levying the said several assessments against the said several properties of the said several plaintiffs in error and others similarly situated and the making of the said several assessements a lien upon the said several properties of the said several plaintiffs in error and others similarly situated and providing that the said several properties of the said several plaintiffs in error and others similarly situated should be sold to pay the amounts so levied and assessed against them

severally in case the said several sums so levied and assessed

120 against the said several properties of the said several plaintiffs in error and others similarly situated were not paid, did not amount to the taking of the said several properties of the said several plaintiffs in error and others similarly situated without due process of law, contrary to the provisions of the fourteenth amendment to the constitution of the United States.

Fifth. That the attempt to assess and levy upon the said real estate of the said several plaintiffs in error, in the record herein described, and upon the real estate of others similarly situated certain charges by virtue of "said ordinance number 3, series 1913", set out in the record in said cause, under the guise of special benefits, and to make said assessments a lien upon the said several properties of the said several plaintiffs in error and others similarly situated against which said charges were provided to be assessed, was not and is not a taking of the said several properties of the said several plaintiffs in error or any of them without due process of law, contrary to the fourteenth amendment to the constitution of the United States.

Sixth. That the Supreme Court of the State of Colorado further erred in holding and deciding that, although the said charter of the city and county of Denver provides for the levying of special assessments against the properties of the several plaintiffs in error and others similarly situated, under the pretence and guise that such properties are specially benefited by the acquisition of lands for parks and parkways to pay for which such special assessments are laid upon and levied against such properties respectively, and for making such assessments liens upon the properties so assessed and that if the assessments so made are not paid the properties assessed shall be sold to pay the sums so assessed against them severally

121 and provides for no hearing before the board or authority authorized to acquire such property and make such assessments and provides only for a hearing before a board or an authority which has no power to decide any complaint which the property owner may have or make with respect to the validity, justice or fairness of such assessment or to correct any error in any such assessment or to equalize the same or to afford a property owner who is aggrieved by such assessment any redress whatsoever and has power only to recommend to the board or authority originally making the assessment any modification of their apportionments of said assessment, which said original board or authority may thereupon make such modifications or changes as to them may seem equitable and just or may confirm the first apportionment or assessment, nevertheless the said provisions afforded and furnished to the plaintiffs in error and others similarly situated due process of law and constitute and amount to due process of law and that such proceeding does not amount to or constitute the taking of property without due process of law and is not inimical, contrary or obnoxious to the fourteenth amendment to the constitution of the United States.

That the Supreme Court of the State of Colorado further erred in holding and deciding that the Supreme Court of the United States had, in that certain case entitled Londoner vs. the City of Denver,

reported in 210 United States 373, decided that the said several provisions of the said charter were sound and afforded due process of law, to those in the situation of plaintiffs in error.

122 For which errors the plaintiffs in error, Henry Farncomb, Emma Donahue, Henry Lorie, M. N. Campbell, The Westminster Mortgage Company, a corporation, Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger, for and on behalf of themselves and all other taxpayers of the City and County of Denver similarly situated and interested, pray that said judgment of the Supreme Court of the State of Colorado, dated the 4th day of March, 1918, be reversed and a judgment rendered in favor of the plaintiffs in error and for costs.

T. J. O'DONNELL,
BERT MARTIN,
OMAR E. GARWOOD,
Attorneys for Plaintiffs in Error Above Named.

123 And afterwards, and on, to-wit, the 13th day of April, A. D. 1918, plaintiffs in error filed a bond in said Supreme Court, said bond being in words and figures as follows, to-wit:

In the Supreme Court of the State of Colorado.

No. 8747.

HENRY FARNCOMB et al., Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants in Error.

Bond.

Know all men by these presents, That we, Henry Farncomb, Emma Donahue, Henry Lorie, M. N. Campbell, The Westminster Mortgage Company, a corporation, Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger, as principal-, and National Surety Company as surety, are held and firmly bound unto the City and County of Denver, (State of Colorado), a municipal corporation; Alexander Nisbet, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property, and James F. Markey, as Auditor of said City and County of Denver, in the sum of Three Hundred & No/100 dollars, to be paid to the said City and County of Denver, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 23rd day of March, 1918.

Whereas, the above named plaintiffs-in-error seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitlel action by the Supreme Court of the State of Colorado.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs that may be adjudged if it shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effffect.

THE WESTMINSTER MORTGAGE COMPANY,
By T. J. O'DONNELL, *Prest. & Treas.*
HENRY FARNCOMB.
T. J. O'DONNELL.
THERESA JARECKI.
EMMA DONAHUE.
BERT MARTIN,
Her Attorney.
HENRY LORIE.
BERT MARTIN,
His Attorney.
E. F. CREARY,
By T. J. O'DONNELL, *Her Atty.*
K. D. O'DONNELL,
M. SINGERS-BIGGER,
G. SINGERS-BIGGER,
I. SINGERS-BIGGER,
By T. J. O'DONNELL,
Their Attorney.
M. N. CAMPBELL.
124 BERT MARTIN,
His Attorney.
NATIONAL SURETY COMPANY,
Attorney in Fact.
[SEAL.] By C. H. TONORAY,

Approved April 13th, 1918.
WM. A. HILL,
Chief Justice.

8747. Filed in the Supreme Court of the State of Colorado April 13, 1918. James Perchard, Clerk.

125 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some

of you, being the highest court of law or equity of the said State in which a decision could be had in the suit of Henry Farncomb, Emma Donahue, Henry Lorie, M. N. Campbell, The Westminster Mortgage Company, a corporation, Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger, and I. Singers-Bigger, for and on behalf of themselves and all other tax-payers of the City and County of Denver similarly situated and interested, plaintiffs in error, and the City and County of Denver, a municipal corporation; Alexander Nisbet, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property; and James F. Markey, as Auditor of said City and County of Denver, defendants in error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution of the United States and the decision was in favor of such their validity and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said constitution, a manifest error hath happened, to the great damage of the said Henry Farncomb,

126 Emma Donahue, Henry Lorie, M. N. Campbell, The Westminster Mortgage Company, a corporation, Theresa Jarecki, E. F. Creary, K. D. O'Donnell, T. J. O'Donnell, M. A. Singers-Bigger, G. Singers-Bigger and I. Singers-Bigger, for and on behalf of themselves and all other taxpayers of the City and County of Denver similarly situated and interested, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 13th day of April, 1918. And the seal of the District Court of the United States for the district of Colorado, at Denver in said district.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk District Court of the United States
for the District of Colorado.

Allowed, April 13th, 1918.
WM. A. HILL,
Chief Justice Supreme Court of Colorado.

Filed in the Supreme Court of the State of Colorado Apr. 15, 1918. James Perchard, Clerk.

127 Filed in the Supreme Court of the State of Colorado Apr. 15, 1918. James Perchard, Clerk.

In the Supreme Court of the State of Colorado.

No. 8747.

HENRY FARNCOMB et al., Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, a Municipal Corporation, et al., Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City and County of Denver, a Municipal Corporation; Alexander Nisbet, as Commissioner of Safety; John B. Hunter, as Commissioner of Improvements; J. M. Perkins, as Commissioner of Social Welfare; Clair J. Pitcher, as Commissioner of Finance; Otto Thum, as Commissioner of Property, and James F. Markey, as Auditor of said City and County of Denver, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Colorado, wherein Henry Farncomb, et al., are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Colorado, this 13th day of April, 1918.

WM. A. HILL,
Chief Justice Supreme Court of the State of Colorado

Attest:

[Seal Supreme Court, State of Colorado.]

JAMES PERCHARD,
Clerk Supreme Court of the State of Colorado.

128 *Acceptance of Service of Citation.*

I, attorney of record for the defendants-in-error in the above entitled case, do hereby acknowledge due service on the 13*nd* day of April, 1918, of the within citation.

J. A. MARSH,
Attorney for the Defendants in Error.

129 I, James Perchard, Clerk of the Supreme Court of the State of Colorado, do hereby certify the foregoing instruments attached to be:

(*a*) The original petition for writ of error, with its allowance.
(*b*) The original assignments of error with application for reversal.
(*c*) A true copy of the bond, and its approval.
(*d*) The original writ of error.
(*e*) Original citation with service acknowledged.

Which were filed in the matter of Farncomb, et al., vs. City and County of Denver, et al., Number 8747, on the Docket of this Court.

In witness whereof I have hereunto affixed the Seal of this Court, at the City and County of Denver, State of Colorado, this 20th day of April, A. D. 1918.

[Seal Supreme Court, State of Colorado.]

JAMES PERCHARD,
Clerk of the Supreme Court,
By A. H. WHITE, *Deputy Clerk.*

130 UNITED STATES OF AMERICA,
Supreme Court of Colorado, ss:

In obedience to the command of the within writ I have transferred to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I have hereunto subscribed my name and affixed the Seal of said Supreme Court, at the City and County of Denver, State of Colorado, this 20th day of April, A. D. 1918.

[Seal Supreme Court, State of Colorado.]

JAMES PERCHARD,
Clerk of the Supreme Court,
By A. H. WHITE, *Deputy Clerk.*

Costs of Suit.

Plaintiffs in Error.....	$20.00.	Paid by same.
Defendants in Error.....	5.00.	Paid by same.
Costs of Transcript.....	40.00.	Paid by Plaintiff- in error.

Endorsed on cover: File No. 26,504. Colorado Supreme Court. Term No. 446. Henry Farncomb, Emma Donahue, Henry Lorie, et al., plaintiffs in error, vs. the City and County of Denver et al. Filed May 13th, 1918. File No. 26,504.

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IN THE

Supreme Court of the United States

No. 446

October Term, 1919.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,
Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

In the interest of brevity, we shall in this brief call the defendant in error, "The City of Denver," "The City," and "Denver."

Questions Involved and the Manner in Which They Are Raised.

The case involves the validity of Special Assessments made to pay for land purchased by the City to establish what is called a "Civic Center" in Denver.

The plaintiffs in error contend that neither the City Charter of Denver, in force at the time of the proceedings which resulted in the pretended assessment were had, nor any law whatsoever provided a tribunal with power to determine and pass upon complaints against, or objections to, the assessment, or to equalize assessments, before which the property owner could be heard.

The plaintiffs in error say that the levying of these pretended assessments against their several properties, and the contemplated procedure to collect the assessments by the sale of the property of plaintiffs in error, operate to deprive the plaintiffs in error of their property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

This question was regularly raised in the court of the State in which the suit was instituted and in the Supreme Court of the State of Colorado, to which the writ of error is directed, and determined against the plaintiffs in error.

Farncomb et al. v. City and County of Denver, 171 Pac. 66.*

*Note: The Colorado report, in which this case will eventually be reported, is not yet printed.

In their amended complaint filed in the District Court of the State, sitting within and for the City and County of Denver, against the municipality and certain officials thereof having to do with the enforcement and collection of the assessment complained of, the plaintiffs in error prayed judgment decreeing the several assessments against their several properties to be null and void, and that an injunction issue restraining the defendants from in any manner enforcing or collecting, or attempting to enforce or collect, said assessments, particularly insofar as they related to the lots and parcels of land belonging to the plaintiffs, and from clouding the title of the plaintiffs to any of the

lands described in the complaint, and from interfering or molesting the plaintiffs in the use or enjoyment of their properties, and that the cloud of the lien of the assessments be removed from the properties of the plaintiffs, and for other relief.

Such proceedings were had in the cause that a demurrer interposed by the defendants to the amended complaint was sustained, and the plaintiffs in error having elected to stand by their amended complaint, judgment was entered dismissing the action and for costs.

Charter Provisions to be Construed.

Pursuant to article XX of the Constitution of the State of Colorado, the validity of which was affirmed by this court in Denver v. New York Trust Co., 229 U. S. 123-141, the charter framed by the Charter Convention of 1904 was adopted. This charter is published in a volume entitled:

The Municipal Code of the City and County of Denver.

Approved April 12, 1906.

By Section 323 of that charter, Denver was divided into four park districts, three of which consist of outlying districts, and the fourth, "The East Denver Park District, all the remaining territory of the City and County," includes the entire business portion of the City and the major portion of the residence section. The land taken for the "Civic Center" and the property assessed for "Special Benefits" to pay the cost thereof are in this "East Denver Park District."

Article XI, of that charter provided for a Board of Public Works, called in the charter the "board," (it is printed here as it is written in the charter), and that this "board" should have charge of local improvements, the cost of which was to be assessed "wholly or in part upon the property especially benefitted." Charter, Sections 270, 271, pp. 92, 93.

It is necessary to refer to certain sections of the charter in relation to the power of the Board of Public Works and the procedure by the board with respect to the assessment of the cost of local improvements against the property especially benefited, because the powers and procedure of the Park Commission, which levied the assessment involved in this suit, are not expressly enumerated in the charter but are conferred by reference to various sections relating to the powers and procedure of the Board of Public Works.

This requires the consideration of three sections, 298, 299 and 300, in relation to the powers of the "board," because these sections are referred to in Sections 328, under which the Park Commission assumed to act in making the assessment complained of.

We first quote, therefore, so much of Section 298 as is necessary for an understanding of the question presented:

"Certificate of Assessment".

"SEC. 298. Upon completion of any local improvement * * * the board shall prepare a statement, showing the whole cost of the improvement, * * * including not to exceed six per cent additional for costs of collection and other incidentals, and including interest to the next succeeding date upon which general taxes, or the first installment threof, are by the laws of this state made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as in this article provided; and shall cause the same to be certified by the president and filed in the office of the clerk."

Section 299 provides:

"Advertisement—Complaints"

"SEC. 299. The clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed, and all persons interested, generally and without naming such owners or persons, that said improvements have been or are about to be completed and accepted, specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land or persons; and that any complaints or objections that may be made in writing by such owners or persons to the board of supervisors and filed with the clerk within sixty (60) days from the first publication of such notice will be heard and determined by the board of supervisors at its first regular meeting after said sixty (60) days and before the passage of any ordinance assessing the cost of said improvements."

And Section 300 provides:

"Supervisors Hear Complaints—Council Assess Cost."

"SEC. 300. At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, *shall hear and determine all such complaints and objections,* AND MAY RECOMMEND TO THE BOARD OF PUBLIC WORKS ANY MODIFICATION OF THEIR APPORTIONMENTS; *the board of public works may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision;* and the council shall thereupon, by ordinance, assess the cost of said

improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

The special assessment involved here rests upon the provisions of the charter in respect to the "Establishment of Parks."

So we quote Sections 324 and 325:

"Establishment of Parks."

"SEC. 324. In addition to the powers herein conferred to acquire lands for parks and park-ways by the sale of the general bonds of the city and county, it shall be lawful for the park commission, with the approval of the mayor, to acquire parks and park-ways in each of the said park districts in the manner following, *the same to be paid for by special assessments upon all the other real estate*, except parks, park-ways and streets, *in such districts, respectively*, or partly out of the proceeds of the sale of the general bonds of the city and county, and partly by such assessments, as the same may be determined by the mayor and park commission."

"Condemnation of Land for Parks."

"SEC. 325. For the purpose of acquiring lands for parks and park-ways it shall be lawful for the park commission and said commission is hereby authorized and empowered, by and with the approval of the mayor, to select, and by a suitable proceeding in the name of the city and county for the use of any such park district, without the passage of any ordinance, to condemn real estate, or, with the approval of the mayor, to purchase any

real estate so selected, for one or more parks or park-ways in each of the said districts, and to select routes and streets for the purpose of establishing and maintaining a system of connecting boulevards and pleasure-ways or park-ways therein. All such condemnation proceedings shall be in accordance with the general laws of the state, so far as the same are applicable, *but the benefit to other lands shall be ascertained and assessed as required in this article.*"

SECTION 326 provides that:

"The parks and parkways so established in any such park district, or such part thereof as may be determined by the mayor and park commission, shall be paid for in park bonds,"

and specifies and provides for the form of the authentication, time of payment and rate of interest on such bonds.

SECTION 327, which is entitled "Sale of Bonds," after making other provisions unimportant to the question here presented, provides:

"Sale of Bonds."

"SEC. 327. * * * *The bonds so issued shall be paid by special assessment upon all the other real estate in the district in the proportions and amounts determined by the commission and assessed by ordinance*, and shall be paid only out of the moneys collected from said assessments; and all the moneys so collected shall be set apart and shall constitute a fund for the payment of said bonds and interest thereon until payment of said bonds and interest in full; Provided, That before acquiring any real estate or issuing any bonds for the purposes aforesaid the commission shall prepare a map of the district and apportion the cost

of the improvement on all the other real estate in the district in proportion to the benefits to each piece of real estate accruing in consequence of the establishment of such parks or park-ways in said district and in accordance with such rules for apportioning the benefits as to the commission may seem just and reasonable; and shall by advertisement for ten days in some newspaper of general circulation published in the city and county, give notice to the owners of the real estate to be assessed of the proposed purchase or condemnation, with a description of the lands to be acquired, the estimated cost, the number of instalments and time in which the assessments will be payable, the rate of interest on unpaid instalments, the rules adopted by the commission for apportioning the benefits, as aforesaid, and the time, not less than ninety days after the first publication, when the question of the proposed purchase or condemnation will be considered by the commission; that said map and all proceedings of the commission are on file and can be seen and examined by any person interested during business hours, within said period of ninety days, at the office of the secretary of said commission, and that all complaints and objections that may be made in writing by owners of any real estate to be assessed will be heard and determined by the commission before final action of the commission in the premises.

"The commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purposes; but if, within the time above specified, a remonstrance shall be filed with the secretary of said commis-

sion, subscribed by the owners of twenty-five per cent in area of the real estate which is to be assessed, then the proposed purchase or condemnation shall not be made, and the proceedings shall not be renewed for one year thereafter; and the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal."

Specifications of Errors Relied Upon.

There are *six* assignments of error, but it may be fairly said that they all raise the same question in a different way, or different phases of the same question in various ways, and that the *sixth* assignment covers all phases of the question as presented; so I shall, without waiving any benefit of any of the other assignments (should the court differ with me in this construction), quote only the sixth assignment of error, viz:

"Sixth. That the Supreme Court of the State of Colorado further erred in holding and deciding that, although the said charter of the city and county of Denver provides for the levying of special assessments against the properties of the several plaintiffs in error and others similarly situated, under the pretense and guise that such properties are specially benefitted by the acquisition of lands for parks and parkways to pay for which such special assessments are laid upon and levied against such properties respectively, and for making such assessments liens upon the properties so assessed and that if the assessments so made are not paid the properties assessed shall be sold to pay the sums so assessed against them severally

and provides for no hearing before the board or authority authorized to acquire such property and make such assessments and provides only for a hearing before a board or an authority which has no power to decide any complaint which the property owner may have or make with respect to the validity, justice or fairness of such assessment or to correct any error in any such assessment or to equalize the same or to afford a property owner who is aggrieved by such assessment any redress whatsoever and has power only to recommend to the board or authority originally making the assessment any modification of their apportionments of said assessment, which said original board or authority may thereupon make such modifications or changes as to them may seem equitable and just or may confirm the first apportionment or assessment, nevertheless the said provisions afforded and furnished to the plaintiffs in error and others similarly situated due process of law and constitute and amount to due process of law and that such proceeding does not amount to or constitute the taking of property without due process of law and is not inimical, contrary or obnoxious to the fourteenth amendment to the constitution of the United States."

The amended complaint states a clear case—at least with respect to some of the plaintiffs in error—of taking private property for public use without just compensation, but so clear does it appear that other inhibitions of the Federal Constitution, have been disregarded by the state court that I have not gone at length into that phase of the question.

Fourteenth Amendment—Due Process of Law.

The first question presented is whether an opportunity to be HEARD *before a body or tribunal* WHICH HAS NO POWER TO DECIDE, *affords due process of law under the Federal Constitution.*

It will be noticed that section 300, supra, provides "that the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections." Section 298 provides for notice that "any complaints or objections * * * will be heard and determined by the board of supervisors."

But the "board of equalization" provided, *has no power to determine.* All it can do is *recommend,* and the Board *which originally made the assessment may accept or reject the recommendation.* The language is: "The board of public works may thereupon make such modifications and changes as to them may seem equitable and just, *or may confirm the first apportionment.*" Sec. 300.

And when the Board has acted, the Council is helpless, because Sec. 328 requires that "the council shall thereupon by ordinance assess the cost against the other real estate as aforesaid, in the district, in accordance with said apportionments."

The complaint is *heard* but not decided. Instead of *power to redress* a wrong the only power possessed is to *refer the complainant to the wrongdoer with a recommendation of mercy!*

Section 328, contains the specific provision for procedure by the Park Commission in accordance with the powers and procedure of the board of public works prescribed in sections 298, 299 and 300, already herein quoted from and referred to.

The crux of the whole question is in section 330 providing for the hearing before the Board of Supervisors and the power therein conferred upon that board, for under section 328 the Park Commission exercises the same power as the board of public works exercises under section 330.

The section, then, as it applies to this case, reads:

> "At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, *and may recommend to the park commission any modification of their apportionments; the park commission may thereupon make such modifications and changes as to them may seem equitable and just*, OR MAY CONFIRM THE FIRST APPORTIONMENT and shall notify the council of their final decision; *and the council shall thereupon, by ordinance, assess the cost of said improvements against all the real estate in said district* and against such persons, respectively, in the proportions above mentioned."

Before it can be said that a tribunal has been established to *hear* a complaint, there must be a tribunal which has power to act upon and *decide* the complaint, to do the complaining party justice if it shall find his complaint well grounded in fact or in law.

Here is no such power.

The power to *recommend* is not the power to *decide*.

If the park commission had been required to follow the recommendation, the contrary might be true, but it is only provided:

> "The park commission *may thereupon make such modifications and changes as to them may seem equitable and just or may confirm the first apportionment.*"

under such a monstrous proceeding. None of the recent charters (the blessings of the initiative have provided Denver so many charters I do not attempt to enumerate them) have contained any such or like provision.

Among the sacred covenants which repose in the rich arks of our constitutional structure, there is none more precious or priceless than that one which reads:

> *"Nor shall any state deprive any person of life, liberty or property without due process of law."*

I shall not attempt a definition of "Due Process of Law," nor shall I tire the court by quoting many of those which have been attempted. This court has said:

> "Apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."
>
> Davidson v. New Orleans, 96 U. S. 97, 104.

In the case cited, Mr. Justice Bradley, in a special concurring opinion in which he concurred in the general tenor of the opinion read by Mr. Justice Miller, said:

> "But I think it narrows the scope of inquiry as to what is due process of law more than it should do.
>
> "It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment, or the

want of a judicial proceeding. If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. The distress-warrant issued in the case of *Murray's Lessee, et al. v. Hoboken Land and Improvement Co.* (18 How. 272) was sustained, because it was in consonance with the usage of the English government and our State governments in collecting balances due from public accountants, and hence was 'due process of law.' But the court in that case expressly holds that '*it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will* (p. 276). I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be

adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require" (pp. 107-108; the italics are the writer's).

This court in Davidson v. New Orleans, *supra*, declared:

> "A most exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the fifth amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. Murray's Lessee, et al. v. Hoboken Land and Improvement Co., 18 How. 272."

In a unanimous opinion of the court in another case, decided at the same term with Davidson v. New Orleans, the court used this language:

> "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, *there must be*

a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."

Pennoyer v. Neff, 95 U. S. 714-733.

Before property can be taken by the public under the taxing power, or any other power (except the overwhelming demand that arises in an exigency, such as that suggested by Mr. Justice Bradley in the excerpt, supra), the owner must have an opportunity to be heard *some time, somewhere, by somebody, whether* before a court or some other tribunal, collective or individual, which has power to decide. Just as in judicial proceedings "*to give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit,*" so before proceedings before any such tribunal as that created by the charter of Denver, to hear complaints against special assessments, can have any "validity," it must "by the law of its creation be competent to pass upon the subject-matter" of the complaint which it is constituted to hear.

> "When, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."
>
> Davidson v. New Orleans, *supra*, p. 102.

In Holden v. Hardy, 169 U. S. 366, 389, this court, speaking through Mr. Justice Brown, said:

> "This court has never attempted to define with precision the words 'due process of law,' nor

> is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence."

And, after referring to the language of Mr. Justice Miller in *Davidson v. New Orleans*, which we have already quoted, said:

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defence" (pp. 390-91).

It is not necessary for this court to consider all the niceties of distinction, nor even all the great fundamental principles involved. The case is too plain for that. Others have done work which relieves the court of this burden.

"Words and Phrases Judicially Defined," page 2231, says:

> " 'Due process of law' is not capable of precise definition. That of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz.: 'Due process of law,' in each particular case, means an exertion of the power of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." (And cases cited.)

Under the title, "Due process of law," in the Cyclopedic Law Dictionary (Shumaker and Longsdorf) 1912, is the following:

> "Law in its regular course of administration through courts of justice."
>
> "It is equivalent to 'law of the land' as used in *Magna Charta.*"
>
> "They (these terms) then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. 96 U. S. 733. (Ex parte Jackson.)"
>
> "Due process of law is *not* any course of procedure that may at any time be established by the legislature." (Citing Dorman v. State, 34 Ala. 216; Moore v. State, 43 N. J. Law, 203.)
>
> "Due process of law embraces only that which is fundamental, and to it is necessary an orderly legal proceeding, whereof the party affected shall have notice, and an opportunity to appear and be *heard.* 169 U. S. 366 (Holden v. Hardy), 96 U. S. 97 (Davidson v. New Orleans.)"

Judge Phillips, in *Moss v. Whitzel*, 108 Fed. 579-582, most happily expressed the principle which should govern in the case at bar in that part of his opinion found on the latter page which is here printed:

> "While the phrase 'due process of law,' as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by a judicial proceeding against him '*to be present be-*

> *fore the tribunal which pronounces judgment;* * * * to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved."

The above is supplemented by the following quotation from *Charles v. City of Marion*, 100 Fed. 38:

> "It is essential to due process of law that there shall not only be *notice* of the time and place for the hearing, *but*, what is *more important*, that there shall be *a tribunal clothed with power*, by methods and rules prescribed by law, *to hear and determine the question involved.*"

One of the later cases before this court in which the question whether land owners were afforded an opportunity to be heard is

> Embree v. Kansas City, etc., 240 U. S. 242-251.

There it is said (p. 251):

> "While no hearing is given when the lands are appraised one is accorded when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice, when, as the Supreme Court of the State holds, owners aggrieved by the valuation may have a full hearing upon that question. This is due process."

I have already suggested that the legislation involved is anomalous. I have been unable to find a case which is even seemingly analogous, let alone one which is on all-fours. There does not seem to be any case in which the question is presented, whether a hearing before a tribunal which has no power to *determine* the matter involved constitutes due process of law and justifies the taking of private property without any other hearing.

The question can be resolved very easily by a mere consideration of the word "jurisdiction." Certainly it will be conceded that before any person or property can be bound by the judgment of any tribunal, that tribunal must have jurisdiction of the person, or property, as the case may be.

But jurisdiction includes more than this. *Jurisdiction includes the power to decide.*

> "JURISDICTION—The authority by which judicial officers take cognizance of and *decide* causes; power to *hear* and *determine* a cause. 3 Ohio 494 (Parker v. Wallace); 6 Pet. (U. S.) 591 (Worcester v. The State of Georgia). And it has been considered that it is essential to jurisdiction that the court should not only have the power to *hear and determine the case generally*, but that in the course of the hearing, and in the particular judgment rendered, it keep within its power. 93 U. S. 282 (Windsor v. McVeigh)."
>
> Cyclopedic Law Dictionary, 1912 (Shumaker & Longsdorf).

"*Words and Phrases Judicially Defined*," vol. 4, page 3878, cites several Colorado cases in support of the following definition:

> "*Jurisdiction * * * is the power to hear and determine the particular case involved.*
>
> In its more general sense, the term 'jurisdiction' when applied to a court, is the power residing in such court to *determine* judicially a given action, controversy or question presented to it for decision. *If this power does not exist with reference to any particular case*, its determination by the court is an absolute nullity. Bigham v. Henrici (Pa.), 16 Atl. 618."

Jurisdiction * * * is the *power to hear and* determine the particular case involved. Bassick Min. Co. v. Schoolfield, 10 Colo. 46.

Another of the Colorado cases cited in "Words and Phrases":

In re Mahany, 29 Colo. 442, declares:

> "*Jurisdiction* * * * is the power to *hear* and *determine* the particular questions in the case involved."
>
> "Jurisdiction is but the power to *hear* and *determine* the questions arising in the case, etc."
>
> Bennett v. Wilson, 133 Cal. 379, 65 Pac. 880-883.
>
> "Jurisdiction is the power to *hear and determine*. As applied to a particular claim or controversy, it is the power to hear or determine that controversy. Central Pac. R. Co. v. Board of Equalization of Placer County, 43 Cal. 365, 368."
>
> Ibid.

The case last cited is valuable because it holds that the *same rule* quoted as *applicable to judicial tribunals applies to a board of equalization.* It was with respect to a matter determinable and determined by a board of equalization that the language quoted was used.

Under a subheading, "*Authority to enforce judgment included*," appear the following definitions:

> "Jurisdiction is simply the *power to hear and determine*, and to *enforce* the judgment, order, or decree made or rendered on such hearing. Dillon v. Heller, 18 Pac. 693-696, 39 Kans. 599. *Jurisdiction is the power to hear and determine causes between parties, and to carry judgments into effect.* Alexander v. Archer, 24 Pac. 373, 376, 21 Nev. 22." (p. 3879.)

"Jurisdiction is the power of a court to *hear* and *determine* a cause, and to enforce its decree." Templeton v. Ferguson, 33 S. W. 329-332, 89 Tex. 47 (p. 3879).

In the same work, p. 3880, it is said:

"As AUTHORITY TO RENDER JUDGMENT. Jurisdiction, says a recent writer, is the right to pronounce judgment acquired by due process of law. Robertson v. State, 10 N. E. 582-583, 109 Ind. 79 (citing Herm. Estop., sec. 69)."

"The term 'jurisdiction' implies that the person or tribunal which has acquired it is thereby empowered to declare or establish an enforceable charge or liability against the person or subject over which it has been acquired. Santa Cruz Rock Pavement Co. v. Broderick, 45 Pac. 863, 865, 113 Cal. 628."

The Question Presented Was Not Determined in Londoner v. Denver, 210 U. S. 373.

In the assignments of error, following that portion of the sixth assignment, already quoted herein, it is said:

"That the Supreme Court of the State of Colorado further erred in holding and deciding that the Supreme Court of the United States had, in that certain case entitled Londoner v. The City of Denver, reported in 210 United States 373, decided that the said several provisions of the said charter were sound and afforded due process of law, to those in the situation of plaintiffs in error."

Probably this statement has no useful place in an assignment of error, but whether this court has or has not passed upon the question presented is most important.

The Supreme Court of the State of Colorado held, in its opinion in the case at bar, that while this court *reversed the judgment* in LONDONER v. DENVER, 210 U. S. 373, *it affirmed one of the wrong reasons which the State Court gave in support of its judgment.*

Our Position Is That the Question Was Neither Presented to Nor Decided by This Court.

The precise question here involved could not be said to have been passed upon by the State Supreme Court in Londoner v. Denver, 33 Colo. 104, the opinion in which was reversed by this court in 210 U. S. 373, until the State court decided in the case at bar that it did pass upon that question in the opinion reported in 33 Colo. Up to that time, every fair reader of the opinion in 33 Colo. was compelled to say that the question was "passed up" rather than "passed upon."

This court neither passed it up nor passed on it nor considered it nor was it ever called to the attention of this court so far as can be ascertained from the opinion in 210 U. S.

The Supreme Court of Colorado has not attempted in the opinion in the case at bar to justify or defend the conclusion which it now declares to be announced in Denver v. Londoner, 33 Colo. 104-111. What it says is:

> "The Supreme Court of the United States, in passing upon the constitutionality of the charter provisions in Londoner v. Denver, 210 U. S. 373, decided that these provisions were sound and afforded due process of law." (Transcript of record, p. 57, fol. 106.)

It then proceeds to quote from the opinion of this Court in the Londoner case.

Ibid.

Before proceeding to show that the Supreme Court of Colorado is utterly mistaken in its conception of what this court decided in the Londoner case, it is well to set out the language of the opinion of the Colorado Supreme Court, announcing the hideous doctrine which it is said this court has adopted.

> "In discussing the inquiry whether the City Council, as a board of equalization, sitting for the purpose of hearing complaints and with power only to recommend relief, is a competent and constitutional tribunal, this court in City of Denver v. Londoner, supra, after discussing Brown v. City of Denver, 7 Colo. 305, said:
>
> 'It is urged that because the judgment of the city council is not final, but its action is subject to revision by the board of public works, that therefore it is not a competent tribunal. The word 'competent' as employed in the Brown case, does not convey any such meaning, but, rather, that the tribunal which the law designates shall be *suitable* and legally qualified to act. It does not necessarily follow that the judgment of such tribunal must be final. The main purpose of affording an owner a hearing upon the question of assessing his land for special benefits is to give him the opportunity to be heard upon the quantum of the tax which may be assessed upon his land, as well as its validity. If this hearing is afforded at some stage of the proceedings he is given the opportunity to be heard which the fundamental law contemplates.' (Citing Bauman v. Ross, 167 U. S. 548.)"
>
> Transcript of Record, pp. 56-57, fol. 106.

It is respectfully submitted that the language shows that the Supreme Court of Colorado, in using it, misconceived the point involved.

This is shown by the language:

"It does not necessarily follow that the judgment of such a tribunal must be final."

The objection to the validity of section 300 is not that the Board of Equalization is not empowered to render *final* judgment, but that the Board is not empowered to render *any judgment*. The language quoted from the opinion indicates that the Supreme Court of Colorado, at the time of rendering its decision in Londoner v. Denver, conceived the Board of Equalization provided for by section 300, to be a Board which had power to decide, to render a decision, to give judgment, but that the decision or judgment rendered was subject to *review* as by appeal or the like.

This is still further and most conclusively shown by citation of Bauman v. Ross as authority for the pronouncement made, as will be pointed out. The attempt to rest the conclusion stated on Bauman v. Ross demonstrates to an undebatable finality that the question was not fully considered or understood by the Colorado court when it decided Denver v. Londoner, supra; that all the Colorado court did, so to speak, was to slide over the question, for the statement made does not support the court's conclusion in the slightest degree nor does the authority cited. *There was not then, and is not now, any authority to support it.*

In Londoner v. Denver, 210 U. S. 373, Mr. Justice Moody sets out, on pages 374-5, the "assignments of error relied upon."

A reading of these assignments will show that none of them presented, or undertook to present, and that when drafting them the framer thereof did not have in mind, the point now under discussion.

"Due Process of law," it is true, is mentioned in the first assignment but it is with relation to a wholly different provision of the charter which is quoted in the assignment.

The same constitutional provision is mentioned in the fifth assignment (page 375) and, while the assignment is very general, it is quite clear that it was directed to the contention so much pressed upon the Colorado Supreme Court, and which was disposed of in the first paragraph of the opinion of that court on the petition for rehearing (33 Colo., page 120) that the provision of the charter was unconstitutional, for the reasons suggested in this paragraph, to-wit:

> "The absence of a *provision* * * * *for notice* to those who may file objections and protests against the assessment and the time and place where such objections would be heard and determined."

In that paragraph, Paulsen v. Portland, 149 U. S. 30, is cited.

The opinion of Mr. Justice Moody discusses the fifth assignment at page 380, and it is part of that discussion which is quoted in the opinion at bar. Reading, we find it said, by Justice Moody, after the remark that the assignment,

> "though general, vague and obscure, fairly *raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law.*"

The language italicized shows what this court was considering, and that it was not the point here presented. This is confirmed by this further quotation from the opinion:

> "The statute expressly required no other notice, but it was sustained in the court below on the authority of Paulsen v. Portland, 149 U. S. 30, because there was an implied power in the city council to give notice of the time of hearing. We

think the Court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it."

Turning now to Paulsen v. Portland, *supra*, it will be seen that it has not the remotest bearing upon the point under discussion. The syllabus of that case shows that the Oregon statute involved was attacked because of "the lack of express provisions for notice," and *not because the tribunal before which those assessed were notified to appear had no power to relieve against an unjust assessment*, and that the meeting, or hearing, the absence of notice of which was complained of, was not for the purpose of hearing objections which might be offered to the assessment as made, but for the purpose of hearing persons interested "in the manner of making said estimate" (see statement of case, page 33).

The analogous contention made in the Londoner-Denver case is set forth in the italicized lines of this portion of the opinion of this court which commences at the bottom of page 375, and ends with a paragraph on page 376:

> "The board of public works, upon the petition of a majority of the owners of the frontage to be assessed, may order paving of a street. The board must, however, first adopt specifications, mark out a district of assessment, cause a map to be made and an estimate of the cost, with the approximate amount to be assessed upon each lot of land. *Before action, notice by publication and an opportunity to be heard to any person interested, must be given by the board.*"

Mr. Justice Brewer, who delivered the opinion in the Paulsen case, used language (page 40) which shows so conclusively that the point here presented was not involved in the Paulsen case that it is respectfully submitted that it should be accepted as a finality:

"The precise objection is, that although proper and sufficient notice may have been given, it was not in terms prescribed by the ordinance appointing the viewers. But, as held by the Supreme Court of Oregon in the case referred to, Minard v. Douglas Co., 9 Ore. 206, that which is implied in a statute is as much a part of it as that which is expressed; and where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is, as said by Judge Strahan, not a strained interpretation that it is implied thereby that some suitable notice shall be given to the parties interested."

It can be confidently stated therefore, that there was no such question involved in the Paulsen case; that no case cited in the Paulsen case raised any such question; that there was no such question suggested in Bauman v. Ross (of which later), nor was any such case cited in the opinion in the latter case; and that this court did not have any such question in mind when it decided the Londoner case; and that *this question has never been decided in any case except* as it was passed over, rather than passed upon, in the decision in Denver v. Londoner, 33 Colo.

What this court had in mind when it said:

"We think the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it" (p. 380),

related *to notice of hearing* and not to the *sufficiency* or *competency* of the tribunal before which it was provided the hearing should be had.

On pages 367-7, sections 30-31, which correspond to the sections under discussion, are quoted.

In the next paragraph the opinion sets out "the main steps to be taken in the execution of the power to make local improvements and assess the cost upon the property specially benefited."

The next succeeding paragraph, commencing on page 378, takes up these main requirements step by step.

> "First * * * the transmission to the city council by the board of public works of the resolution to do the work and the form of an ordinance authorizing it."

Then follows a statement of the contention

> "that there was wanting an essential condition of the jurisdiction of the board (to pass the resolution) namely, such a petition from the owners as the law requires."

Mention is made of the fact that the trial court found this contention to be true, but the right of the city council to conclusively determine that such a proper petition had been filed, and that it had made such finding, is stated.

Then follows the language which is quoted in the opinion of the Colorado Supreme Court (transcript of record, p. 57, fol. 106), and which it may be assumed those who concurred in that opinion believed to have some relation to the point involved. That it has no such relation is clear from what has been pointed out. The language has reference to the provisions concerning a step far anterior to that provision which pretends to provide the taxpayer an opportunity to be heard as to the fairness and justice of the apportionment of the cost of the improvement, *i. e.*, the particular assessment against his property.

That this is true it needs nothing more than the reading of the language which follows immediately the quotation from page 378 exhibited in the opinion.

> "The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made,"

and, to make assurance doubly sure, follows this language,

> "Clearly all this might validly be done *without hearing to the landowners, provided a hearing upon the assessment itself is afforded.*"

Another quotation by the State court from the opinion of this court in Londoner v. Denver, supra, found on page 57 of the transcript, follows:

> "The State Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the State. The only question for this court is whether the charter provisions authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not."

It is respectfully submitted that no authority for the decision below can be extracted from that paragraph of the opinion of this court. Its presence in the opinion of the State court is cumulative evidence of the fact that the PLAINTIFFS IN ERROR never succeeded in directing the attention of the Supreme Court of the State of Colorado to the point involved.

Neither that paragraph of the opinion nor the paragraph quoted from page 380, and found in the transcript immediately following, related in any way to the question now brought to this court for decision.

The proof mounts when the following language of this court, found on page 384, in reference to the protest addressed by the property owners to the board of public works and the city council, and which is set out in the opinion is considered.

> "Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated but in a specially called session, and, without any hearing, adopted the following resolution."

Again, on page 385, it is said:

> "From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them."

On the same page appears this significant language:

> "In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form."

Will a court which regards "substance and not form" ever so far forget the difference between the two as to hold that the *form* of a hearing thus provided for in the charter provisions in question can be successfully substituted for the *substance—a hearing before a tribunal capable of administering relief to those who, with justice, appeal to it?*

The substantial thing about a judgment is the power to enforce that which it prescribes. When once it is entered it is something which can be seen. It is substance. The rule adopted in the opinion would supplant substance with faith. (See Hebrews, XI-I.)

There is no basis for the claim that the question now presented was considered by this court in LONDONER v. DENVER; that it was not fully considered or understood by the State court when that same case was before the State court, is also apparent; that very little thought should have been given to the question by the State court is quite natural when the number of other questions involved in that case and its two companion cases referred to in the opinion, is taken into consideration; that the counsel in the case did not consider it of importance, is evident from the following quotation from the closing page of the very able brief for Londoner et al. (appellees in 33 Colo., plaintiffs in error in 210 U. S.):

> "At the outset we believed the only point necessary to a decision of this case and *perhaps the only question which we were really justified in discussing, is the question as to whether or not the city had a petition of the owners of a majority of the frontage to be assessed before it ordered the improvements* and enacting the ordinance creating the district."

It is true that in the *Kennedy case, 33 Colo. 80-93*, one of the cases referred to in the opinion of Mr. Justice Moody, there is a casual reference on page 91 to "Due process of law." But it will be seen that if the questions now presented, occurred to the writer of the opinion in the Kennedy case or to the judges concurring therein, they were never mentioned.

The opinion in the Kennedy case is of great length; the discussions of the opinion are, practically speaking, wholly of other questions; there is a dissenting opinion which does not mention this question at all; the reference, if reference there be, to the provisions of the charter involved, found on page 91, is merely casual; the questions which are decided in that opinion are of grave importance; all this made it easy that the point so squarely presented in the case at bar should have been shunted onto the sidetrack and passed by without much notice.

Nothing whatever is said on the question in the Dumars case (33 Colo. 94-104), except that it will be decided in the Londoner case.

This leaves *Denver v. Londoner, 33 Colo. 104-111* the sole support for the opinion of the lower court in the case at bar. What is said on the subject in the *Londoner case* in *33 Colo.* is found in paragraph 4, on pages 111-112.

There isn't a sentence of reasoning in it. If ever there was an illustration of reasoning in a circle, it is there.

In the first place, there is no statement of the provisions of the charter applicable; no reference to the fact that the Board of Public Works, by which the "judgment of the City Council * * * is subject to revision," is *the same board which instituted the proceeding, and made the initial assessment, the board from whose action the property owner is, ostensibly, given the privilege of appealing to the city council.*

The opinion then takes up Brown v. City of Denver, and the vigorous expression of fundamental constitutional right therein expressed, "that the hearing contemplated must be 'before a board or tribunal competent to administer proper relief' " is quoted.

Then follows an attempt to whittle away the well known and often judicially ascertained meaning of the term "competent tribunal," and then it is said, in effect, that the Brown opinion did not mean "a *competent* tribunal * * * but, rather, that the tribunal which the law designates shall be *suitable* and legally qualified to act."

What is the meaning of the word "*suitable*" as there used? Suitable to whom? Why suitable?

This is begging the whole question. Is a tribunal "legally qualified to act," when its action is utterly ineffective, when it has no power to decide, when its judgment binds no one, when it is a mere advocate and not a judge?

Then follows this statement, "It does not necessarily follow that the judgment of such tribunal must be *final.*" This reads well enough. The judgment of the Supreme Court of Colorado, in this case is not *final,* but it is *final,* unless the unsuccessful party thereto shall succeed in having it *reversed* by a court having jurisdiction to reverse it. It is a *judgment,* not a *recommendation.* If there had been an *appeal* allowed to either party from the decision of the city council, that would not have interfered with the *finality* of the judgment, in case no appeal were taken.

Then follows this grand masterpiece of judicial camouflage:

> "The main purposes of affording an owner a *hearing* upon the question of assessing his lands for special benefits, are to give him the opportunity to be heard upon the *quantum* of the tax which may be assessed upon his land, as well as its validity. If this hearing is afforded at some stage of the proceedings, he is given the opportunity to be heard which the fundamental law contemplates." (P. 112.)

What good the *hearing* when the tribunal which hears can *hear only*, and can grant no *relief?*

It is quite evident that the learned author of that opinion never considered, for a moment, the seriousness of the proposition involved. If he ever comprehended the question he carefully avoided answering it. That the question involved was not comprehended is, as said before, evident from the authority cited, Bauman v. Ross, 167 U. S. 548.

Turning to that case it will be found that it involved the validity of an act of Congress, which provided for opening streets in Washington and assessing a portion of the costs upon abutting property.

The substance of the language last quoted from the opinion in 33 Colo., is found in the fourth clause of the Syllabus in Bauman v. Ross.

The real and only questions involved in that case, so far as the due process of law clause is concerned, *was whether it was "due process of law" to assess the benefits from the street opening in the same proceeding in which land for the opening of the street was condemned.* That the "competency" of the tribunal could not have been involved; that no such question as that here arising could have arisen, or been considered, is shown when it is stated, that *the* whole proceeding was *a condemnation proceeding* in the Supreme Court of the District of Columbia.

That was "the tribunal which the law designated" as "*suitable and legally qualified to act.*" Its judgment did not have to be *final.* It was not *final*, as, witness that the case went to the Supreme Court of the United States, but, it had that *finality which is a necessary accompaniment of jurisdiction*, as the word "jurisdiction" is known in law.

No one can seriously argue for a single minute that the Supreme Court of the District of Columbia, sitting in a case in which all the parties to the proceeding were required to

be summoned and impleaded according to the law of the land, furnishes analogy or example for holding that the device invented by some legal prestidigitator and finding its first, and, so far as the record discloses, its only example, in the city charter of Denver, constitutes "due process of law."

The interpretation of the opinion of the Supreme Court of Colorado by this court is found in the opinion in 210 U. S., p. 381:

> "The statute *expressly required no other notice*, but it was sustained in the court below on the authority of Paulsen v. Portland, 149 U. S. 30, because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it."

This quotation shows that *the matter which the court had under consideration was not the question presented here*, but this consideration:

> "The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact *that no opportunity for hearing was afforded*, and the Supreme Court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed the board of public works, in compliance with sec. 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed.

> Thereupon the city clerk, in compliance with sec. 30, published a notice, stating, *inter alia*, that the written complaints or objections of the owners, if filed within thirty days, would be 'heard and determined by the city council before the passage of any ordinance assessing the cost.' Those interested, therefore, were informed, that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action'' (p. 380).

So that it is quite plain that this court never had presented to it, and never decided the question here presented, and the conclusion of the State court, in the Londoner case, having been reversed, all argument by which that conclusion was reached, fell with the conclusion.

Under the view of the Londoner case adopted by this court, it was unnecessary to decide whether the charter *provides* for such a hearing as constitutes due process of law. This court decided in that case that the parties *were not allowed a hearing such as is provided for by the charter*, therefore, the question of whether a hearing under that provision, *if had*, would have constituted due process of law, never could have been before this court.

The considerations advanced are so fundamental, and so conclusively sustained by all methods of reasoning which influence courts in arriving at conclusions, that it requires

that there should have been an express determination of the very question here involved to authorize the court to disregard these considerations.

This court in the Londoner case, reiterates that a "hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and if need be, by proof, however informal" (p. 386).

Can it be said that it does not also require that it shall be before a tribunal empowered to *decide the* question presented? To hold otherwise would be to

> "Keep the word of promise to our ear,
> And break it to our hope."

Other Questions Involved.

THE PRIVILEGES AND IMMUNITIES OF CITIZENS ABRIDGED TAKING PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

The amended complaint in the case at bar presents one of the most flagrant instances of the taking of private property for public use without compensation, that has ever been called to the attention of this court.

Commencing on page 31 of the transcript, immediately following the assessing ordinance and the allegation (fol. 54) that the City and County of Denver threatens to sell the several properties of the plaintiffs to pay the said several pretended and so-called assessments against their several properties, and that plaintiffs have a common interest in resisting said attempt to levy and assess the tax against their several properties under the guise of an assessment for special benefits, the plaintiffs jointly and severally allege that the City was without authority to pass the assessing ordinance set out, viz:

"That the said pretended ordinance and the provisions thereof abridge the privileges and immunities of citizens of the United States, and abridge, and attempt to abridge, the privileges and immunities of these plaintiffs, severally and respectively as citizens of the United States."

There follows an allegation to the effect that the real estate, the costs of acquiring which is attempted to be assessed against the several properties of the plaintiffs, has not been acquired "for or as a public park," etc., and then this allegation:

"That no special benefits or benefit accrue, have accrued, or can accrue to the property of these several plaintiffs, or to the property of either or any of them, on account of the said supposed acquisition of the said certain real estate, or the said supposed or attempted establishment of the said supposed public parks and parkways, in the said supposed and so-called ordinance mentioned."

Then follow certain objections to the fact that the proceedings leading up to the passage of the ordinance did not follow the provisions of the charter, which it is unnecessary to consider (fols. 56-67).

Then there are allegations attacking the integrity of the pretended proceedings before the Board of Supervisors for matters of fact, and the allegation that the sitting of the Board of Supervisors as a Board of Equalization was not "for the purpose of equalizing assessments, or hearing or determining the, or any, objections or complaints against said assessments." * * *

"And while, at the said pretended sitting, the said Board of Supervisors, pretending to act as a Board of Equalization, did pretend to sustain the

objection of one Clark, to the amount of a total of Fourteen Dollars and Sixty-five cents ($14.65), the said pretended action was merely for the purpose of pretending to show that the said Board of Supervisors sat as a Board of Equalization, and did pretend to hear and determine said pretended objections and complaints, and to equalize said attempted assessment.

"That the said pretended sustaining of the said particular objection was for the purpose, and for the purpose alone, of giving color to the pretense that the said pretended Board of Equalization had heard and determined said pretended complaints and objections, and had passed upon the same, and had equalized the said pretended and so-called assessment of pretended and so-called special benefits and to deprive these plaintiffs and others similarly situated of their rights under the Constitution of the United States, to be heard, and to make it appear that these plaintiffs had the benefit of due process of law, and an opportunity to be heard, when it was at all times known by the so-called Board of Supervisors, and by these plaintiffs, and by all other persons similarly situated, that the said so-called Board of Supervisors was without power or authority to act as a Board of Equalization to equalize said pretended and so-called assessment for special benefits, and without power or authority to hear or determine the, or any complaints or objections, and without power or authority to pass upon the same, and that the said so-called Board of Supervisors, pretending to sit as a Board of Equalization, would not undertake or attempt to equalize, adjust or in any manner determine the said pretended and so-called assess-

ments, or the equality thereof, or whether or not the property of these plaintiffs, or of people generally, was or was not specially benefited, or if benefited, to what extent, or whether the pretended and so-called assessment for special benefits did or did not equal the amount undertaken to be and about to be levied and assessed against them and upon their said properties" (pp. 33-34; fols. 67-68).

Then follow certain allegations intended to show irregular action on the part of the City authorities in bringing about the establishment of the so-called Civic Center, and that as a matter of fact the same was not legally established because the officials of the City induced certain protestants against such establishment to withdraw their protests, and that there was no authority for such withdrawal, and that if such protests stood the project was defeated under the charter.

And then, on page 36, folio 71, it is alleged:

"That the said supposed certain real estate so acquired by the said City and County, under the name and guise of, and for the pretended purpose of, establishing the same as public parks and parkways, was not acquired, or attempted or intended to be acquired by the said City and County to be used as or for the purpose of public parks and parkways, but was acquired for other and different purposes, and that the said City and County has not and had not any authority to levy or assess the cost of any such acquisition or establishment against the property of these plaintiffs, under the guise or pretended form of assessments for special benefits.

"That the said property was acquired and intended to be acquired for general public purposes, which, in so far as those purposes were legally justified, or authorized by any law, relate to the acquisition of property for general purposes, and the general use and benefit of the City and County as a whole, and could not and cannot specially benefit the property of these plaintiffs, or any of them, or others similarly situated, except as it may, if the purpose thereof should turn out to have any benefit in any way, benefit property in said City and County generally, and in proportion to its value.

"That the property so acquired by the said City and County of Denver, the entire cost of which acquisition is attempted to be assessed upon property, including that of these plaintiffs, under the guise of special benefits, is situated directly in front of and adjoining the State Capitol Building and the grounds thereof between the said Capitol Building and its grounds and a certain public building heretofore established by the said City and County as a Public Library, and that one of the actual, and as well of the declared purposes of the said acquisition was to beautify, enlarge, and enhance the scope and effect of the said Capitol grounds and the surrounding view of the said Library, and that another of the said purposes thereof was and is, that thereafter the said City and County should and would acquire, facing upon the grounds so acquired, other grounds, for the purpose of erecting thereon public buildings, such as Court House, City Hall, etc., the particulars in this respect being too lengthy to justify repetition herein, and thereby make and establish a general public improve-

ment for the general benefit of all the people, and that the actual purpose of the said supposed acquisition of lands, the cost of which is now attempted to be levied against the property of these plaintiffs and others similarly situated, as assessments for special benefits, was to provide grounds for general public, municipal and county buildings, and to be used as such.

"*That another purpose of the said supposed acquisition of the said lands was to restrict and confine the business district of the said City, and to prevent the spreading of business establishments over a large territory, and into residence sections, so that the harmony of the general plan of the promoters of the scheme for the acquisition of the said property, the cost of acquiring and establishing which it is now attempted to assess against the property of these plaintiffs and others similarly situated, might be maintained.*

"That it was at all times, since the beginning of the pretended proceedings, by virtue of which the supposed property was acquired, and by virtue of which it is now attempted to assess the cost of such acquisition against the property of these plaintiffs and others similarly situated, well known to the public authorities of the said City and County, and to all those vested with authority concerning the doings and things which resulted in the present attempt to levy and assess the cost of said acquisition against the property of these plaintiffs and others similarly situated, *that the said acquisition and the said establishment did not tend to, and could not and would not result in special benefit to the property of these plaintiffs, or any of them, or others similarly situated, but only,*

if at all, in general benefit, and that the scheme, plan, and device of attempting to provide for the cost of acquiring the said real estate, and establishing the same under the name of public parks and parkways, was merely because the cost thereof could not under the law be otherwise levied or assessed, and that the same was a plan, scheme, device and artifice to avoid the law, and to acquire the said property in defiance thereof, and to obtain from these plaintiffs and others similarly situated, the cost and price thereof, under the guise of special benefits, well knowing that no special benefits on account thereof were or would be obtained by, accrue to or result to, these plaintiffs or any of them, or their property, or any of it, or to others or to the property of others similarly situated" (pp. 36-37, fols. 71-73).

After some other allegations not specially material to the purpose of this argument, it is alleged:

"That the principal purpose for which the said Civic Center was inaugurated and projected was that all of the property located in the then present business district of the City and County of Denver (all of which is property other than the property of these plaintiffs, or any of them) would be greatly enhanced in value because the said Civic Center would prevent the establishment of business enterprises south of said Civic Center, and in which direction the retail business of Denver was at that time rapidly moving." (P. 38, fol. 74).

Then follow allegations of other irregularities, including illegal inducements to property owners to withdraw protests, and other allegations attacking the method leading up to the pretended assessment, as not following the charter.

And then these allegations:

"That the said pretended assessments, by the said ordinance pretended to be levied, assessed and made against the property of these plaintiffs and each of them, is outrageous, unjust, CONFISCATORY, *and without regard soever to any supposed benefit that might possibly accrue to them or either or any of them, or to their said several respective properties or any of them.*

"*That the said pretended assessments are attempted to be made upon the property of these plaintiffs and others in a similar situation, without ratio, proportion, scheme or plan; that the said pretended benefits are purely guess work, chimerical and have no reasonable proximation, and that the assessments attempted to be levied against said property have not been arrived at through any conceivable scheme of benefit that any property might now, or hereafter, or at any time, derive from the acquisition of said lands, and the pretended establishment of the same for the pretended purposes mentioned.*

"*That the said assessments are individual, favorable or unfavorable according to individual preference of the said City to respective owners; that the basis thereof is neither distance from said acquired lands, front foot, area, nor value, nor is there any other criterion by which the justice or reasonableness thereof, or the pretended benefits can be measured.*

Then follow other allegations of want of authority under the city charter to establish a civic center, and reference to section 300 of the charter and the allegation that it does not constitute due process of law under the Constitution of the United States.

Then follow (pp. 42-46, fols. 80-88) specific allegations on the part of various plaintiffs in error, severally, with respect to their several properties describing the properties, giving the amount of the pretended assessment against the property, and as to each this allegation in substance:

> "That said pretended assessment against said lots greatly exceeds in amount the assessment of other lots owned by other persons and corporations in the same vicinity for the same street frontage and equal area, and which, if there could be any special benefit whatsoever, would be benefited to a greater extent and in a higher sum than said lots mentioned, and that the said pretended assessment against said lots is upon a different plan by a different ratio and in a different proportion from the pretended assessment for the same properties and other lots similarly situated (owned) by other persons and corporations."

The plaintiff Creary (fol. 84), in addition to an allegation of a general nature already described, makes this allegation:

> "That the said E. F. Creary is and at all times in the complaint and herein mentioned was a citizen of the State of California, and that the said Lots 3 and 4, Block 172, are by the said attempted pretended assessment attempted to be taxed and made to bear and answer for a larger sum in proportion to the costs of the said so-called improvement than is property similarly situated belonging to citizens of the State of Colorado; and that by the said pretended *and so-called assessment the said E. F. Creary is denied the privileges and immunities of a citizen of the State of Colorado, and of the United States*" (p. 44, fol. 84).

And we invite the particular attention of the court to this allegation of the plaintiff in error K. D. O'Donnell, in respect to one of the tracts owned by her, which allegation is in addition to the general allegation mentioned:

> "That the said K. D. O'Donnell is the owner of Lots 11 and 12, Block 7, Whitsitt's Addition to the City of Denver; and that the pretended assessment against the said lots for the said pretended special benefits is the sum of $75.89 each.
>
> "*That the said lots last mentioned are situated in the portion of said City and County of Denver which lies due south of the said land so acquired and pretended to have been laid out as a public park, and herein mentioned and referred to as the Civic Center. That the business district of the said City of Denver lies to the north and northerly of the said land so acquired. That the purpose of the acquisition of the said land and the pretended laying out of the same as a public park was as herein aforesaid, to restrict and confine the business district of said City to the north of the said land so acquired, and to prevent the same from spreading over and going into property to the south thereof; and the said purpose was and is to prevent the said lots in said Whitsitt's Addition from becoming business property, and to restrict and confine the same to residence purposes. That the said property is residential property of a cheap class, and does not produce any income and cannot now be made to produce any considerable or adequate income upon its value. That until the establishment of the said so-called Civic Center, and the acquisition of said land for the purpose of establishing the same herein referred to, the said property had greater actual*

value by reason of a just expectancy that said business district of said city would shortly spread so as to include the said property; and that the result of the acquisition of said land for the purposes for which it was acquired, and of the scheme and plan, has been and is to actually damage said lots in Whitsitt's Addition in a very large sum of money; that the actual damage thereto greatly exceeds the amount attempted to be assessed as special benefits against the same, and that the said pretended improvement is and will continue to be an actual damage and detriment to the said property and not a benefit." (Tr., p. 45, fols. 85-6.)

This allegation is a statement of destruction of value by a method as effectual, in its way, as the methods of the German armies on the plains of Flanders and Picardy.

The case of the plaintiffs in error the Singers-Bigger presents another case of *confiscation* almost equally unjustifiable. After describing two different tracts belonging to those particular plaintiffs and the amount of the assessment against them, it is said as to both properties that they:

"lie about five miles in a northeasterly direction from the said so-called Civic Center and the property acquired for the purposes thereof as in the complaint and herein mentioned, and are separated from the main portion of the said City of Denver and from the portion in which the said land so acquired is situated, by the trunk lines of a number of the principal railroads entering the City of Denver. That said lots have no value except for manufacturing or trackage purposes. That there is no homogeneous connection or relation between the neighborhood in which said lots are situated, and that for the pretended benefit of which the

said land has been acquired; and that the attempted inclosure of said lands in the said park district was and is arbitrary and unreasonable, and that the said prtended assessment against the said lots and each of them is for the reasons in this paragraph given, in addition to the general reasons herein alleged, illegal and confiscatory; and that the said pretended assessment when added to other assessments for special benefits and the general taxes recently laid against the same by the said City and County of Denver amounts to the confiscation of the said property and exceeds the value of the said lots." (Tr., p. 47, fol. 89.)

A review of all the cases with facts similar or analogous to those alleged in the amended complaint with reference to particular properties of the several plaintiffs in error, which this court has had occasion to consider, would unduly lengthen this brief, hence it will not be attempted. Running through them all is clear recognition of well known principles limiting the power of municipalities to impose special improvement taxes.

The denunciation of the action condemned in *Norwood v. Baker, infra,* as:

> "An abuse of the law and an act of confiscation, and not a valid exercise of the taxing power"

would apply to the facts shown by the record here.

Nearly all of these principles are referred to in opinion in *Norwood v. Baker*, 172 U. S. 269, written by Mr. Justice Harlan, which goes very thoroughly into the theory and practice of levying special assessments. All later decisions of this court follow the principles there laid down.

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when ex-

erting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. * * *

"In Cooley on Taxation (2d ed., c. xx), the author in considering the subject of taxation by special assessment, and of estimating benefits conferred upon property by a public improvement, says that, while a general levy of taxes rests upon the ground that the citizen may be required to make contribution in that mode in return for the general benefits of government, special assessments are a peculiar species of taxation, and are made upon the assumption that 'a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property

peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, *are at the same time to suffer no pecuniary loss* thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.' Again, the author says: 'There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation.'

"In Macon v. Patty, 57 Mississippi 378, 386, the Supreme Court of Mississippi said that a special assessment is unlike an ordinary tax, in that the proceeds of the assessment must be expended in an improvement from which 'a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed.'

"So, in the matter of Canal Street, 11 Wend. 154, 155, 156, which related to an assessment to meet the expenses of opening a street, the court, after observing (observed) that the principle that private property shall not be taken for public use without just compensation was found in the constitution and the laws of the state, and had its foundation in those elementary principles of equity and justice which lie at the root of the social compact.' * * *

"In McCormack v. Patchin, 53 Missouri 33, 36, the Supreme Court of Missouri said: 'The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. *A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation.*' See also Zoeller v. Kellogg, 4 Mo. App. 163.

"In State, etc v. Hoboken, 36 N. J. L. 291, 293, which was the case of the improvement of a street and a special assessment to meet the cost—such cost being in excess of the benefits received by the property owner—it was held that to the extent of such excess private property was taken for public use without compensation, because that received by the landowner was not equal to that taken from him. * * *

"After referring to a former decision of the same court, in which it was said that special assessments could be sustained upon the theory that the party assessed was locally and peculiarly benefited above the ordinary benefit which as one of the community he received in all public improvements, the opinion (in State v. Newark, 37 N. J. L. 415) proceeds: 'It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case no reason can be assigned why the tax is not general. An assessment laid on the property along a city street for an improvement made in another street, in a distant part of the same

city, would be universally condemned, both on moral and legal grounds. And yet there is no difference between such an *extortion* and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him. * * *

"So in Bogert v. Elizabeth City, 27 N. J. Eq. 568, 569, the court said: 'The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burden is to be borne by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to legal rules now at rest in this State, cannot be executed. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities, but are nullities.'

"In Hammett v. Philadelphia, 65 Penn. St. 146, 151, 153, the court, speaking by Judge Sharswood, said, 'the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water pipes, in proportion to their respective fronts, has been repeatedly recognized, and the liens for such assessments enforced.' 'These cases,' the court said, 'all fall strictly within the rule as originally enunciated—local taxation for local purposes—or, as it was been elsewhere expressed, taxation on the benefits conferred, and not beyond the *extent* of those benefits.' * * * If the sovereign breaks upon a strong box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of

the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon and *measured by, the extent of his particular benefit, it is, pro tanto,* a taking of his private property for public use without any provision for compensation" (pp. 278-285).

Judge Harlan, the writer of the opinion, then quotes from Dillon on Municipal Corporations. The italics are the court's.

"Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation several courts of great respectability either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property *was the only principle upon which such assessments can justly rest*

and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just and reasonable doctrine*, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large it must be borne by the general treasury."

Charles v. City of Marion, 100 Fed. 38, follows *Norwood v. Baker*, and very closely parallels the case before this court, as under the assessment there involved, the owners of property abutting on a street about to be paved had no opportunity to appear before any body, board or council, and show that the assessments to be levied were in excess of the benefits derived from the improvement. If the plaintiff in that case were entitled to relief, the plaintiffs here are doubly so, for there the property assessed fronted on the proposed improvement, while in the case at bar a large part of the property sought to be charged for "special benefits" is a great distance from the so-called improvement, the lots in Swansea and the first addition thereto, owned by the plaintiffs, the Singers-Bigger, being more than five miles away, and not in anywise benefited by the so-called improvement, and the property in Whitsitt's Addition, mentioned in the complaint, being cut off, as it were, from the business section of the city, for all time, and as well not being abutting property. As said on pages 542-3:

"It is clear that the statute under which the present proceedings are prosecuted provides that the entire cost of the street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage

measurement, without any regard to the special benefits received by it. It provides for no notice and hearing to ascertain and determine the actual benefits specially received by the landowner by reason of such improvement. * * * Such legislation is unconstitutional and void, under both the federal and the state constitutions, because it constitutes a taking of property without just compensation, and is a denial of the equal protection of the law. Statutes substantially like the one under consideration, since the decision in Village of Norwood v. Baker, *supra*, have been held invalid by many courts, although prior to that decision the same or similar statutes had been upheld by the same courts upon the same theory upon which the legislation of this state has been upheld. The court contents itself with simply citing those cases, which seem decisive of the question: Hutcheson v. Storrie (Tex. Sup.), 51 S. W. 848; Sears v. Board (Mass.) 53 N. E. 138; Same v. Commissioners, id. 876; Walsh v. Barron (Ohio Sup.), 55 N. E. 164; Birdseye v. Village of Clyde, id. 169; Loeb v. Trustees (C. C.), 91 Fed. 37; Fay v. City of Springfield (C. C.), 94 Fed. 409; Lyon v. Town of Tonawanda (C. C.), 98 Fed. 361."

To the same effect are:

Cowley v. City of Spokane, 99 Fed. 840, where it is held that:

"Special assessments levied on abutting property for the cost of street improvements under the statutes of Washington, which require the assessment of the entire cost of such improvements on the abutting property, and which are levied by the front foot rule, *or other methods having no reference to benefits accruing thereto*, are in viola-

tion of the provision of the constitution of the United States against the taking of private property for public use without just compensation."

And

Zehnder v. Barber Asphalt Paving Co., 106 Fed. 103.

In a case in which the City of Kansas City, Mo., attempted to levy a local improvement tax for sprinkling the streets, Judge Phillips, sitting in the Circuit Court of the Western District of Missouri, in declaring the ordinance void under the federal constitution, cited an Illinois case (Chicago v. Blair, 149 Ill. 310), and said:

"This precise question has been considered and determined by the Supreme Court of Illinois. * * * While it is to be conceded that, in some other jurisdictions, the contrary view has been expressed, the reason and authority of the Illinois court commands my entire approval. It holds that such an assessment as practiced by the city for street sprinkling was violative of fundamental law, because it is not predicable of an improvement—a betterment—of the adjacent property. After showing that sidewalks and grading and paving of the streets do, in the experience of men, enhance the market value of contiguous lots, with pungent force the court observed:

" 'It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh cut flowers, or by open air concerts, in which music should be selected with

reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt would add to the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of the grass upon the lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly the healthfulness of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment.' "

New York Life Ins. Co. v. Prest, *et al.*, 71 Fed. 815-17.

There is nothing in *Wagner v. Baltimore*, 239 U. S. 207-219, which detracts in any way from anything that is said in any of the cases or authorities cited.

In *Wagner v. Baltimore*, the court was careful to say that it did not want what it said to be understood (p. 219-20):

"To mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of land owners because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise."

In *French v. Barber Co.*, 181 U. S. 324-345, a provision of the charter of Kansas City, Mo., levying the cost of asphalt paving on a certain street by front foot was challenged on the ground that an assessment by that measure did not necessarily imply benefits equal to the assessment levied. Mr. Justice Shiras, in concluding his opinion, said (p. 345):

> "Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement."

Compare that statement of the facts in that case with these allegations of the amended complaint, found among those already quoted:

> "That the said pretended assessments are attempted to be made upon the property of these plaintiffs and others in a similar situation, without ratio, proportion, scheme or plan; that the said pretended benefits are purely guesswork, chimerical, and have no reasonable proximation, and that the assessments attempted to be levied against said property have not been arrived at through any conceivable scheme of benefit that any property might now, or hereafter, or at any time, derive from the acquisition of said lands, and the pretended establishment of the same for the pretended purposes mentioned.

"That the said assessments are individual, favorable or unfavorable according to individual preference of the said City to respective owners; that the basis thereof is neither distance from said acquired lands, front foot, area, nor value, nor is there any other criterion by which the justice or reasonableness thereof, or the pretended benefits can be measured" (transcript, p. 40).

Nevertheless, Mr. Justice Harlan wrote a vigorous dissenting opinion in the French-Barber case in which the present Chief Justice and Mr. Justice McKenna concurred. In that dissenting opinion, after stating (p. 349) that the cost * * * when ascertained * * *

"*must* be borne by the abutting property, according to its *frontage*, even if such cost be in substantial excess of the special benefits, if any, accruing to the property assessed. So the abutting property *must* bear the cost, according to frontage, even *if such cost equals the full or actual market value of the land.*"

It is said:

"Thus, the entire property abutting on the street improved, and subjected by the statute, that is, by the city charter, to a lien in favor of the contractor or his assignee, may be taken from the owner, for the benefit of the general public, to meet the cost of improving a public highway in which the entire community is interested. But that circumstance, it is contended, is not of the slightest consequence; for—so the argument in support of the statute runs—the legislature having determined that the land abutting on a public street shall, according to its frontage, meet the cost, whatever it may be, of improving that street, the courts cannot inquire whether the owner has

> received any such special benefit as justifies the putting upon him of a special burden not shared by the general public for whose use the improvement was made, nor inquire whether the cost of the work equals or exceeds the value of the property. I cannot assent to this principle. It recognizes, contrary to the principles announced in *Norwood v. Baker*, 172 U. S. 269, 277, 279, 293, 297, the existence in the legislative branch of government of powers which, I take leave to say, cannot be exercised without violating the Constitution of the United States. In that case, upon the fullest consideration, it was held, as had been held in previous cases, that the due process of law prescribed by the Fourteenth Amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. We also held that an assessment upon abutting property for the cost and expense incurred in opening a street was to be referred to the power of taxation, and that the Constitution of the United States forbade an exercise of that power that would put upon private property the cost of a public work in substantial excess of the special benefits accruing to it from such work."

This is followed by copious quotations from Norwood v. Baker, already embraced in these pages. Although a dissenting opinion, the distinguished ability of the writer of the opinion and of those who concurred in it, makes it most valuable, and particularly in matters in which it does not go contrary to the judgment of the court.

The distinction between the *French-Barber* case and the case at bar is so palpable as to need no restatement. I shall not attempt to follow the luminous and informing

opinion of Mr. Justice Harlan, or to show the analogy between the facts in many of the cases he mentions and those in the case at bar. It cannot be passed over, however, that on *page 360* the same construction is given *Bauman v. Ross* which is contended for in this brief and which was so obviously overlooked by the Supreme Court of Colorado when citing that case in the *Londoner case, 33 Colo.* It is said, after stating the facts involved in *Bauman v. Ross:*

> "In such a case, the owner of the property being given full right to be heard before an authorized tribunal upon the question of special benefits, no question could arise such as is presented in the present case" (p. 360).

The language of Cooley on Taxation, referred to and quoted in that portion of the opinion in *Norwood v. Baker,* printed in this brief, is referred to on page 362, and this follows:

> "To this we may add the declaration of the author when, speaking for the Supreme Court of Michigan in *Thomas v. Gain,* 35 Mich. 155, 162, he said: 'It is generally agreed that an assessment levied *without regard to actual or probable benefits* is *unlawful as constituting an attempt to appropriate private property to public use.*'"

Again on page 366 the learned Justice states what is meant by *confiscation,* in these words:

> "If the property is assessed beyond the special benefits accruing, there is confiscation *to the extent of such excess.*"

In this, as in previous quotations, the italics are found in the opinion.

On page 367-368 it is said:

"We live under a Constitution which is the supreme law of the land. It enumerates the powers of government, and prescribes limitations and restrictions upon legislative authority as to the property of citizens. Some of these limitations and restrictions apply equally to the Congress of the United States and to the legislatures of the States. If it be true that the only ground upon which a special assessment can be legally imposed upon particular private property to meet the cost of a public improvement is that such property receives, or may reasonably be held to receive, special benefits not shared by the general public—and no one, I take it, will dispute the soundness of that principle—and if it be true that the property cannot be made to bear a portion of such costs in substantial excess of special benefits, it necessarily follows that the owner of the property is entitled to protection against any legislative rule or requirement that puts upon his property a burden greater than can be lawfully imposed upon it. How can he obtain such protection except through the courts? To say that he cannot do so is to say that the legislature possesses an absolute unlimited power over rights of property which is inconsistent with the supreme law of the land. Is it to become a canon of constitutional construction that the courts may interfere when the legislature authorizes a special assessment that will amount to the confiscation of the entire property assessed, but will not interfere when the confiscation is only to a limited, although a material, extent. In other words, is there to be a difference, so far as the powers of the courts are concerned, between confisca-

> tion, under the guise of taxation, of the entire property of the citizen and confiscation of only a part of it?"

In *French v. Barber, supra*, the legislature enacted the *rule* by which the cost of the improvement should be assessed and the territory over which the assessment should extend. It enacted that the entire cost of a half mile of street paving should be spread along the half mile of street in accordance with the frontage on this half mile and distributed the cost among the owners according to the *frontage* belonging to each particular owner.

The right of the legislature to enact the *rule* was affirmed.

In the case at bar the legislative authority did not attempt to enact the rule. The admitted allegations of the bill are that the assessment was attempted without rule or plan; that the assessments rest neither on benefit, present or future, nor area, nor frontage, nor distance, nor value, and that the assessments are favorable or unfavorable to owners according to individual preference of the assessing authority to the respective owners. Under these circumstances, whatever may be the disagreements between the majority and minority opinion in the case in *181 U. S.*, these opinions will be searched in vain for any disagreement as to the rights of property owners in the situation of the plaintiffs in error, as shown by this record.

The language of Mr. Justice Hughes in

St. Louis, etc. Co. v. Kansas City, 241 U. S. 419-429, is peculiarly applicable in view of the allegations of the amended complaint. On page 429, it is said:

> "It is true that all taxes and assessments are laid by some rule of apportionment. Where the scheme of distribution is palpably arbitrary and

contsitutes a plain abuse it may be condemned as violative of the fundamental conceptions of justice embodied in the Fourteenth Amendment."

None of the cases to which we have called the court's attention presented, nor have we found any case which presents, as flagrant a case as that stated in the allegations with respect to the plainiff in error, K. D. O'Donnell's property, in Whitsitt's Addition (Transcript, p. 45). If the court were permitted to take judicial notice of such very local geography, an examination of the map of Denver would show that what has happened is that *the street upon which this property is situated has been closed* up at its northern terminus where it connected with the business section of the City, and, as alleged in the amended complaint, the property *assessed for benefits has thus been doomed to remain dormant and unproductive.* Possibility of increase in value, which the property possessed before this "improvement" was made, has been cut off. The property is walled up. The acts described amount to a taking just as much as if the City had entered upon the property and put it to use for some municipal purpose; the only difference is in the degree, and yet, notwithstanding the damage done is admitted, the property is assessed for *special benefits instead of being awarded special damages;* this is confiscation in its rankest sense.

Every rule of justice and equity which the courts have erected as barriers against the taking of the property of citizens under the guise of assessments for special benefits, has been violated in the case at bar. This statement does not rest upon disputed evidence but upon the undisputed allegations of the amended complaint.

CONCLUSION.

Notwithstanding what we have said upon this phase of the case, and the flagrant abuses in the individual cases disclosed by the allegations of the amended complaint which we have quoted, we still respectfully submit that the most important question, the question urged in the first part of our brief, is that *the provisions of the city charter, to which we have adverted, are obnoxious to the "Due Process of Law" clause of the Fourteenth Amendment.*

The question whether a tribunal with power to *hear*, but without power to *decide*, is one upon which a citizen is compelled to depend for the protection of his rights, is as important a question as has ever been presented to this court. It will never be more squarely presented than it is presented by the record in this case. It will have to be decided some time. It should be decided now.

The history of this court renders us optimistic that it will not countenance the proposition *that one who is convicted without trial or an opportunity to be heard, has had due process of law if, perchance, he may intercede with someone to use his influence, by way of* SUGGESTION *to the judge of the* STAR CHAMBER, *that the sentence be modified or remitted.*

Respectfully submitted,

T. J. O'DONNELL,
Attorney for Plaintiff in Error.

J. W. GRAHAM,
Of Counsel.

Supreme Court
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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 110.

OCTOBER TERM, 1919.

HENRY FRANCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,

Plaintiffs in Error,

vs.

THE CITY AND COUNTY OF DENVER, ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Reply Brief of Plaintiffs in Error.

T. J. O'DONNELL,
Attorney for Plaintiffs in Error.

J. W. GRAHAM,
Of Counsel.

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IN THE

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No. 110.

October Term, 1919.

Henry Farncomb, Emma Donahue, Henry Lorie, et al.,

Plaintiffs in Error,

vs.

The City and County of Denver, et al.,

Defendants in Error.

In error to the supreme court of the state of Colorado.

Reply Brief of Plaintiffs in Error.

It is most creditable to the counsel for the City that they do not undertake to defend the charter provision (Section 300) in question or the decisions of the Supreme Court of Colorado, either in 33 Colorado, or that

in the case at bar, upholding that provision as furnishing due process of law. On the contrary, counsel, inferentially at least, admit the soundness of the position of Plaintiffs in Error by this statement, found on page 5 of their brief:

> "If this was the first time that this question had been raised, or the first time that this section of the charter had ever been considered by the courts, *it might be that the issue presented would be debatable*, but the same identical question has been determined by the Supreme Court of the State of Colorado."

Counsel then attempt to take refuge behind *res adjudicata* and *stare decisis*, and, most curiously, and by a process of reasoning all their own, arrive at the conclusion that the decisions of the Colorado court are binding on this Court, in respect to the federal question involved, and, apparently, that the decision of the Colorado Court, construing the opinion of this Court in the LONDONER case, 210 U. S. 373, is also binding on this Court.

Counsel for the defendants in error seem to complain on the same page of the brief (p. 5), that the plaintiffs did not apply to the city authorities for relief. It would seem obvious that if the proceedings are void, the plaintiffs in error pursued the appropriate remedy in the appropriate tribunal; they appealed to a court of competent jurisdiction to prevent the sale of their property under the void assessment. If any precedent were necessary for a proceeding so patently regular, the practice adopted is conclusively sustained in BROWN V. DENVER, 7 Colo. 305, hereinafter quoted from.

Under the decision in that case, if we had actually appeared before the Board of Supervisors, we would not have been bound, and we submit that such is the logical conclusion and follows the well-known rule with relation to judicial tribunals, that appearance before a court, which lacks jurisdiction of the subject matter, does not bind the party appearing. An appearance before the Board of Supervisors could not confer on the Board of Supervisors power to *determine* the complaint made, and therefore such appearance would not bind the property owner.

We recognize that the discussion of this question is academic, except in so far as it irresistibly leads to the conclusion that, if by appearance the plaintiffs would not have been bound, they have lost no rights by failing to appear. If jurisdiction can not be conferred by *action*, it can not be conferred by *inaction*.

We will follow, as nearly as practicable, in this reply, the order of discussion adopted in the City's brief.

Preliminary Proceedings.

The plaintiffs in error have never claimed, and do not now claim, that any federal question is presented by the allegations of the amended complaint with respect to "preliminary proceedings." These allegations were presumably inserted in the original complaint and afterwards embodied in the amended complaint for the consideration of the courts of Colorado, and not for the consideration of this Court. Generally speaking, they do not present federal questions.

Due Process of Law.

Under this head counsel, on page 8 of their brief, state the proposition presented by plaintiffs in error as being, "that in order to afford due process of law an opportunity must be afforded to be heard before a *tribunal with jurisdiction to determine.*" And counsel then admit that "there is no question but * * * an opportunity must be afforded at some stage * * * for the taxpayer to be heard before a tribunal *competent to hear.*"

Counsel would have stated the position of plaintiffs accurately, had they stated their claim as being for an opportunity "*to be heard before a tribunal with jurisdiction to* **hear and determine.**

We should thus have brought the controversy down to the single and naked question of whether it is *enough* that the tribunal have power to *hear* and *unnecessary* that it shall have power to *determine.*

It will be observed that counsel do not attempt to justify the statement in the opinion in DENVER *v.* LONDONER, 33 Colo. (See page 305, quoted on page 25 of the plaintiffs' first brief), to the effect that the word "competent," as applied to such a tribunal, does not mean a tribunal possessing any particular power, "but, rather" a "tribunal *suitable* and legally qualified to act."

If counsel intend to ever defend that statement of the Colorado Supreme Court in the LONDONER case, they can never find a more appropriate place or fitting opportunity; but instead of undertaking such an impossible task, they content themselves by saying that the Supreme Court of Colorado has held, in the case at bar, that Sec-

tion 300 affords due process of law, and that it so held in 33 COLORADO, and that this Court so held in 210 U. S.; they characterize our contention that the question is not concluded by the decision in 210 U. S. as a "wonderful discovery."

Then follows (pp. 9, 10, 11) a long excerpt from 33 COLORADO, to show that the Colorado Supreme Court has held that the provision in question does afford due process of law.

If the Colorado Supreme Court had not so held, it must be assumed that this case would not be here. The fact that "this decision was rendered," as is said, "more than eight years before the present action was commenced," it is submitted can make no difference, inasmuch as the plaintiffs commenced their action within an appropriate time after the illegal attempt to impress their property with an unwarranted charge was made.

After commenting upon the holding of the Colorado Supreme Court, and stating that "The statute as construed" (by the Colorado Court) "was not obnoxious to the Federal Constitution," it is said: "A taxpayer could feel assured that if he followed the procedure provided by the charter, he would be heard before a tribunal that had jurisdiction to determine his complaints and objections."

Where such a tribunal is to be found, what provision of the charter provides it, what the tribunal is, these are nowhere pointed out. In making the statements quoted, counsel have had to abandon the holding of the Supreme Court of Colorado, that all that is necessary is a **"tribunal * * * suitably and legally qualified to act"** and to abandon their own position

in the first paragraph on page 8 of their brief, that **"a tribunal competent to hear"** is necessary.

BROWN v. CITY OF DENVER, 7 Colo. 305, is mentioned in the opening brief of the plaintiffs in error. It is cited and referred to in the opinion in DENVER v. LONDONER, 33 Colo. 104, and in the opinion in the case at bar.

In the opinion in the BROWN case, referring to "due process of law," it is said (pp. 311-12):

> "The doctrine of the authorities is that whenever it is sought to deprive a person of his property or to create a charge against it preliminary to or which may be made the basis of taking it, the owner must have notice of the proceedings and be afforded an opportunity to be heard as to the correctness of the assessment or charge. *It matters not the character of the proceedings* * * * whether administrative, judicial, summary, or otherwise; at some stage of it, and before the property is taken, or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given, otherwise the constitutional guaranties above cited are infringed. * * * As applicable to summary proceedings of the character under consideration, its meaning is comprehended in the foregoing paragraph. If the law authorizing the proceedings provides for notice to the owner * * * and an opporunity to appear at a specified time and place, before a board or tribunal *competent to administer*

> *proper relief*, in order that he may be heard concerning the correctness of the charge before it is made conclusive, the constitutional requirements are satisfied."

Then ensues language which, had it been followed by the State Court in the case at bar, would have rendered it unnecessary for plaintiffs in error to invoke the aid of this Court to protect their rights. We have printed the more salient statements in italics.

> "But when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, *as a matter of favor, in the case*. Nor does it satisfy the constitutional requirements that the assessment is fair and just. *A valid assessment can not be made under an invalid law or ordinance and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions.*"

Citing, among other cases, DAVIDSON v. NEW ORLEANS, 96 U. S. 97.

Under the ordinance involved in PALMER v. WAY, 6 Colo. 106, and in BROWN v. CITY OF DENVER, *supra*, *notice* was given to the property owner *to build the sidewalk* or the City would cause it to be built at his expense. It was held, that this did not take the place of the notice and opportunity to be heard required

under the DUE PROCESS OF LAW provisions and principles now being discussed. This was, in effect, the same kind of notice and preliminary proceeding which was required under the charter provisions discussed in the LONDONER case, and under the like provisions of the charter in this case. As to such notice this Court held that *the preliminary notice not being required by any principle of the law of Due Process*, appellee to give it violated no right of the property owner, providing he had a hearing upon the assessment itself. (See our [illegible] brief, p. 31.)

Counsel cite the case of PUEBLO v. CHAMBERS REALTY CO., 44 Colo. 396, and say that the doctrine laid down by the Supreme Court of Colorado in the LONDONER case is there adhered to. The opinion in the PUEBLO case does not disclose that there was even a suggestion of the question presented here raised in that case; but had it been otherwise, its correct import is that *this Court is to be bound by opinions and decisions of the State Court only* when they [illegible]

The Supreme Court of Colorado, in the case cited, affirmed the judgment of the District Court avoiding an assessment because of irregularity in the giving of the preliminary notice. It is not our business to consider that decision with the definition in the LONDONER case in 33 Colo., that such preliminary notice is not essential; now are we concerned with whether the Colorado Court did there, either inferentially or expressly, assert the proposition that provisions, such as those found in Section 310 of the Denver charter, afford due process of law to one in the situation of plaintiffs in error.

A rather weak attempt is made to support one of

the property owners and when recommended by the Board of Health, and it was claimed such recommendation had been made.

The Supreme Court of Colorado in that case flatly refused to apply the principle of estoppel on the ground that the plaintiffs had allowed the work to progress to completion without making any objection. (P. 122.)

Res Adjudicata.

An attempt is made in the opinion of the Supreme Court of Colorado to show that the plaintiffs in error are foreclosed by the opinion in LONDONER *v.* DENVER, 52 Colo. 15, and what is said in the opinion on that subject is quoted in the brief of the City at pages 16 and 17.

It may be that plaintiffs in error are bound by the decision in 52 COLO. in relation to the matters alleged as to the preliminary proceedings, mentioned in the City's brief at pp. 6 and 7, and which have already been disposed of in this brief, by the showing that they are not here involved.

The question, to what extent property may be taken or charged under proceedings obnoxious to the DUE PROCESS OF LAW provisions of the Federal Constitution, because the State Court, in a suit brought by another property owner, has held that the law does not violate the Federal Constitution, is not before this Court in this case. Were the Court called upon to decide that question, it is submitted that this honorable Court would not indulge in any such circumfluent argument as that found in the brief for the City.

An examination of the case in 52 COLO., now relied

on as being *res adjudicata* against the plaintiffs in error, will disclose that the question now presented was neither raised nor decided. This is so conclusively shown by these two paragraphs of the opinion in the case that we quote them in full.

> "2. The charter provisions authorize the board of park commissioners to initiate the public improvements in question, and to finally determine whether the lands, necessary therefor, shall be acquired, subject, however, to the will of the owners of a certain percentage in area of the real estate to be assessed for the cost thereof, to annul that authority by expressing their disapproval of the proposed improvements within a designated time. It therefore, follows, that until the property owners have, by their non-action approved, or by their action disapproved the proposed improvements, the power to proceed lies in abeyance.
>
> "However, as the matters upon which the findings, here sought to be restrained, *pertain to questions preliminary in their nature*, they do not affect the constitutional rights of any party in interest. They might have been dispensed with by the law-making power, and full authority vested in the park commission, or other city authorities, to acquire the lands and make the proposed improvement without any preliminary proceedings whatever. As said in *Londoner v. Denver*, 210 U. S. 373, 379: 'The legislature might have authorized the making

of improvements by the City Council without any petition'."

The syllabi of the case, particularly paragraph 2 of clause four of the syllabi, shows clearly that what is decided in that case is that *"property owners will not be allowed, in advance of the passage of an ordinance as contemplated* by the Section (327), *an injunction to restrain the exercise of this power."*

Turning to Section 327, it is found that the provisions referred to are contained in the *proviso* of that section. This *proviso* is printed in full in our first brief, commencing on page 7.

The appeal to this Court to sustain the unjust exactions which the City of Denver is attempting to enforce against the property of the plaintiffs in error under the doctrine of stare decisis or res adjudicata, is repudiated by Colorado decisions.

The attempt to lug in "vested rights" and the proposition that we have waited until the work was done, have already been disposed of, and we think we have said enough to dispose of *res adjudicata* and *stare decisis;* but, if not, what is added here should suffice.

The Supreme Court of Colorado did not hesitate, in 1884, to declare invalid, in BROWN *v.* DENVER, 7 Colo. 305, an assessment to pay for sidewalks under an ordinance which it held to be valid in 1881, in PALMER *v.* WAY, 6 Colo. 106.

In PALMER *v.* WAY, the property owner *attacked*

before the sidewalk was laid. Brown *waited* until the sidewalk was laid. Figuratively, and probably literally, he walked to the courtroom on the sidewalk to get the decision which exempted him from paying for it. This and the KEYES CASE, already referred to, in 10 COLO., dispose of the pleas of counsel in the respects mentioned.

McQuillen on Municipal Corporations, Volume 5, Section 2220, page 4517, states the general rule thus:

> "Finally a property owner will not be estopped from contesting the validity of the assessment by remaining silent while the improvement and assessment is being made unless he knew (1) that it was being made (2 Ohio cases), (2) that the public authorities intended to assess the cost thereof, or some part of it, upon his property (Indiana, Iowa, 2 cases—Wisconsin), (3) *that the infirmity or defect in the proceedings*, which he is to be estopped from asserting, existed (Iowa, Michigan), and (4) *it must appear that some special benefit accrued to his property*." (Ohio.)

In the same volume, Sections 2123 and 2124, the author shows that the principles upon which counsel for the City rely apply only to cases in which *mere irregularities* in the assessment are asserted, and do not apply to cases where the facts are as shown by the record here.

Special Benefits.

Counsel have devoted a number of pages to our objections that the property of the plaintiffs is not specially benefitted. They say, p. 19:

> "The objections, as shown by the complaint, are so general in character as to not form any basis for a determination as to whether or not the property of the plaintiffs is benefitted or not."

We are quite willing that the complaint shall be judged by this criterion suggested by counsel.

> "The allegations must be such that the Court would be enabled from them to determine whether the property in question was specially benefited or not, and it should not be left to conjecture as to whether, or in what amount, the property was benefited."

The allegations of the complaint in this respect are epitomized and quoted from on pages 40 to 50, both inclusive, of our original brief, and there are others, but if the language there quoted does not plainly meet the requirement contended for by the City, we are confident that we could not present any argument which would strengthen it.

Upon this branch of the discussion counsel cite VOIGHT *v.* DETROIT CITY, 184 U. S. 115-122.

The case supports every position for which we contend, as may be gathered from the fact that it is stated in the opinion of MR. JUSTICE McKENNA that the State Supreme Court had decided that the amount of the assessment in such a case can not exceed the benefits. On hearing given him, the property owner had an opportunity to show that he was not benefited, or that the charge against his property exceeded the benefits, but he is not

entitled to notice of every step, and (p. 121) there is no claim that the property is not benefited, no claim that the owner did not have notice and opportunity to be heard, and in conclusion:

> "It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose can not be defeated if a hearing to the property owner can prevent defeat. He is given a **thoroughly efficient opportunity to be heard.** (p. 122.)

SPENCER *v.* MERCHANT, 125 U. S. 345, presents no question of notice or opportunity to be heard, but simply the power to re-assess, the first assessment having been declared void by the State Court for want of notice. "The land owners were given a hearing, and so there was no constitutional objection in that respect **nor was the hearing illusory,"** a statement pregnant with the suggestion that no such specious pretence of an opportunity to be heard, or hearing, as is contained in the Denver charter provision attacked, will suffice.

Indeed this Court must have sensed the possibility of just such an attempt as was made by the Denver City charter, to pretend to give a man a hearing which would comply with the constitutional requirement, but which would avail the property owner nothing; hence the phrase, **"nor was the hearing illusory."** 125 U. S., and **a thoroughly efficient opportunity to be heard."** 184 U. S.

Counsel again, on page 25 of their brief, recur to the proposition that because plaintiffs in error did not appeal to the disappearing and shadowy pretense of a tribunal, provided by the charter to *hear* their grievances, they can have no relief in the courts of the land. Their constitutional rights are lost because they failed to grasp at the will-'o-wisp held out to them by the Denver charter. We have already answered this phase of the curious argument evolved.

The brief of the City betrays a strange psychology, a psychology for which, doubtless, the attempts, by legislation and by judicial decision, to fence off the property owner and keep him away from and prevent him from having any opportunity to present his grievances, or relieve his property from excessive and illegal exaction, are responsible.

Barring the section of the charter directly involved in this case, and the decisions of the Colorado Supreme Court construing the same, this effort reaches its supremest phase in that section of the charter which was construed in CITY OF DENVER *v.* CAMPBELL, 33 Colo., 162, cited in the City's brief. This charter provision virtually says to the property owner:

> "You may pay the assessment against your property, in a lump sum, in thirty days,"

or,

> "You may pay in installments."

The alluring enticement to the property owner to pay is held out in the assessing ordinance in the case at bar. We beg to quote:

> "Section 3. *All the assessments* herein made *shall be due and payable within thirty*

days of the publication of this assessing ordinance without demand * * *, and when so paid, an allowance of four per centum flat * * * and also interest at the rate of five and one-half per centum per annum from the time of said payment to March 1, 1913, shall be made and deducted: *provided that* all such assessments may *at the election of the owners* be paid in *installments* with interest as hereinafter provided. *Failure to pay the whole assessment within said period of thirty days shall be conclusively considered and held an election on the part of all persons* interested, whether under disability or otherwise, to pay in such installments. *All persons so electing* to pay in installments *shall be conclusively considered and held as consenting to said improvements and such election shall be conclusively held and considered as a waiver of any and all right to question the power and jurisdiction of the said City and County to make said improvements*, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessment."

If the property owner shall accept the first alternative and pay in full, he will from thenceforth be in the position of one of the characters described in a well-known bit of Western verse, for neither *"subsequent proceedings"* nor *precedent conditions* can interest him further.

If he fails to accept this spider-like invitation to pay in full, what happens to him is stated in the quotation from the CAMPBELL CASE printed in the City's brief, *i. e.*,

he is "conclusively presumed to have elected to pay * * * in installments, and having made this election" * * * is "precluded from thereafter raising any question with respect to the steps taken, or the regluarity of the proceedings which are purely statutory and not required by virtue of any provision of the constitution."

Certainly this is an ingeniously devised web, more ingenious than was ever spun by any arachnidan spinner, for the victim of this web is enmeshed, although he fly away, whereas in the other case the destruction of the victim follows his blind or wilful folly.

Counsel quote, on page 27, from WAGNER v. BALTIMORE, 239 U. S., 217-218. There is nothing in the opinion or in the theory upon which the special tax involved in that case was sustained which conflicts with this statement in the opinion of this Court in the LONDONER CASE, pp. 385-386:

> "But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. It must be remembered that the law of Colorado denies the land owner the right to object in the courts to the assessment, upon the ground that the objections

> are cognizable only by the board of equalization."

The decision in the BALTIMORE case is based on this fact, set out in the opinion of MR. JUSTICE DAY:

> "This assessment, and the classification of the property to be improved, were fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front."*

In the case at bar all the charter does is to fix the territorial boundaries. All property within those boundaries (with certain specified exceptions) is to be assessed "in the proportions and amounts determined by the Commission and assessed by ordinance." (Charter, Sec. 327; see our original brief, page 7.) This language brings the case at bar within the principle for which we contend, and eliminates WAGNER v. BALTIMORE as authority.

In WAGNER v. BALTIMORE, the property was by the Act divided into three classes, (a), (b) and (c), and the rate of taxation upon each of the classes was fixed in the Act. The Tax Appeal Court of Baltimore was authorized and directed to classify and list all landed property in the city, which on a certain day was in a situation to come under the requirements of either of the classes. *It was required that before classification*

* The decision in Hancock v. Muskogee, 39 S. C. R. 528-30, is based on the same principle.

"with reference to the liability of the property for the tax and the claim to which it properly belonged."

BALTIMORE TRACTION CO. v. BALTIMORE BELT RAILROAD CO., 151 U. S. 137: We have not been able to find in the opinion the language quoted in the brief. The writ of error was dismissed in that case because no federal question was involved. We quote, "As the want of the requirement of notice did not exist, the alleged ground of our jurisdiction fails."

The case of GREEN v. NEAL, 6 Pet. 291, referred to in the Baltimore Traction Co. case, and quoted from *in extenso* in the brief of the City, presented a question arising under the Statute of Limitations of Tennessee. This Court had followed what it supposed was the construction of the statute adopted by the Supreme Court of Tennessee; that construction was never considered as having been finally adopted in Tennessee. If it were, Tennessee had changed, and this Court reversed itself to follow the Supreme Court of Tennessee in its construction of the Statute of Limitations.

There is nothing in the portion of the opinion quoted, nor in the case anywhere, to make it authority here. Its citation is cumulative evidence of the erroneous view held by counsel for the City as to the effect upon this Court of the decision of the Supreme Court of a State construing a State statute under circumstances such as are presented by the case at bar.

We are glad that counsel has called attention to the assessing ordinance, not only by reason of the provisions thereof already quoted in this brief, but because of the recital found on pages 28-29 of the transcript of record, showing that this so-called Board of Equalization, acting under Section 300 of the charter, "did duly *hear and determine*" the complainants and objections filed to this

two-million-dollar assessment, and did overrule the same, and *did recommend* to the Park Commission * * * *that no modification of its apportionments of said assessment * * * be made, save and except that the proposed assessment against two lots named be reduced in the sum of $11.05 for each lot.*

The charges of the original bill, although neither their truth nor materiality is before this Court for decision, are abundantly justified by the sham and pretence so apparent from this recital, of calling what occurred a hearing.

Conclusion.

Ending as they began, counsel's brief is pervaded with the thought that this Court is controlled by the Supreme Court of Colorado with respect to the question whether or not the charter provisions afford DUE PROCESS OF LAW.

We have shown that under the allegations of the amended complaint the plaintiffs below are not specially benefited.

We have shown that there will be no loss to innocent purchasers of the bonds issued.

We have shown that if there be any benefit from the improvement, as it is called, it is a general benefit, and, hence, morally chargeable against all the property of the people of the community benefited and not specially against the property of the plaintiffs, whose property is not specially benefited.

We have shown that even had there been special ben-

within the constitutional meaning of that word, by calling it so in the title.' So, in SOON HING v. CROWLEY, 133 U. S. 703, 710: 'The rule is general, with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment.' In MUGLER v. KANSAS, 123 U. S. 623, 661, the court, after observing that every possible presumption is to be indulged in favor of the validity of the statute, said that the judiciary must obey the Constitution rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed."

The merchant sloop of CHIEF JUSTICE MARSHALL, in delivering the opinion of the court, in McCULLOCH v. MARYLAND, 4 Wheaton, 316, 431:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create, * * * are propositions not to be denied",

has never been successfully disputed and is no longer denied.

It is that "power to destroy" under the guise of "power to tax" that is involved here. We believe that no more vicious attempt to penetrate the barriers erected by the great pronouncements of this Court to protect the property of individual citizens from communal greed and ruthlessness, has ever been brought to the attention of this Court. We are persuaded, and we respectfully hope we have been able to convince this Court, that here is a plain, palpable attempt to evade and escape the restraint, against lawless expropriation and confiscation, *under the guise of the "power to tax"*, which this Court has so often laid upon the hand of the despoiler.

All of which is respectfully submitted.

T. J. O'DONNELL,
Attorney for Plaintiffs in Error.

J. W. GRAHAM,
Of Counsel.

"Help Me, Cassius, or I Sink."

City prior to the time the present learned counsel for the defendants appeared, ever discovered the saving grace lurking in Section 327. District Judge Dennison, now Mr. Justice Dennison of the Supreme Court of the State of Colorado, the Judge who passed upon the demurrer, did not attempt to extract any balm from Section 327. He held that the Supreme Court of Colorado had decided in the LONDONER case, 33 Colo., that Section 300 *did* afford due process of law. In the Supreme Court of Colorado, voluminous briefs were filed and oral argument had. The opinion of the Colorado court was handed down January 7, 1918. The present honorable city attorney, senior counsel for the City here, and other learned counsel appeared for the City in the State Supreme Court (Tr., p. 55, fol. 103).

The opinion of the Colorado Supreme Court rests its judgment upon the proposition that the Court had decided in the LONDONER case, 33 Colo., that Section 300 afforded due process of law, and that this Honorable Court had so held in the LONDONER case, 210 U. S. There was a petition for rehearing. Briefs were filed by the present learned counsel and other counsel in opposition to such petition. Then the case came to this Court, and, as stated in the supplemental brief, counsel for the respective parties attended upon this Court to argue the case. A month or more elapsed after counsel had gone home, when—"Sudden as thought came like a full blown rose" the discovery that Section 327 affords the necessary DUE PROCESS OF LAW, and that section 300 is mere surplusage.

Under these circumstances, we submit that the presumptions are against counsel and lead to the conclusion

that this late-day reliance on Section 327 is a *dernier resort*. Certainly it would seem most unfair to hold the plaintiffs in error foreclosed of their right to a hearing as to the justice of the charge made against their property, because they construed the charter provisions involved exactly as they were construed by the City government, including the City's legal advisers, and as they were construed by the *nisi prius* and Supreme Courts of Colorado.

Aside from this, the position assumed in the supplemental brief is untenable. It has no support in either reason or authority.

Section 327 relates to and prescribes certain preliminary proceedings of the nature which both this Court and the Supreme Court of Colorado in the LONDONER case held to be unnecessary. If the giving of the notice provided for in the section was unnecessary, the *failure* to appear in response to the notice could not be prejudicial.

In LONDONER V. DENVER, 52 Colo. 15-50, already referred to in this brief and in the brief for the defendants in error, the Supreme Court of the State, in denying the taxpayer's right to relief, says (p. 25):

> "The only constitutional right possessed by the property owner, as to the making of the proposed improvement, is to a hearing upon the question of what is termed, the apportionment of the tax; *i. e.*, the amount of the tax which he is to pay. VOIGHT V. DETROIT, 184 U. S. 115; GOODRICH V. DETROIT, *Idem*, 432. This constitutional right is fully protected by

> the notice which the charter, Sections *209* and *328*, 'requires shall be given by the city clerk and the proceedings in accordance therewith, afford the owners full opportunity to be heard on the question of assessments against their property.' DENVER v. DUMARS, 33 Colo. 94, 101."

The decision in the LONDONER case, 52 Colo., is, in effect, a declaration that Section *327* gives the property owner no rights whatever, that everything offered in it is voluntary, something which the City might have withheld, that it limits no right which the City would have if that section were not contained in the charter.

That Section *327* conferred any such right had not then been discovered by the attorneys for the City.

The statement of counsel on page 5 of the supplemental brief, that "this section (*327*) * * * was not involved in previous cases decided by the Supreme Court of the State of Colorado, and was not involved in the LONDONER case, * * * in 210 U. S.," is rather remarkable in view of the facts.

MR. JUSTICE MOODY, in his opinion in LONDONER V. DENVER, 210 U. S., commencing at the bottom of page *375*, refers to provisions in the then charter of Denver, respecting the character of improvement involved in the LONDONER case, in language which we have quoted on page 28 of our original brief.

Turning to that charter in the Session Laws of Colorado for 1893, we find, at pages *202* and *203*, provisions identical with the provisions of Section *327*.

These provisions are contained in the clauses of Section 3 of Article 7, numbered First, Second, Third and Fourth. In spirit, purpose and effect, they are identical with the provisions of Section 327. Barring the difference in the various time periods mentioned, the variation in language incident to the difference in the nature of the improvement being provided for, and the substitution of "commission" for "board," the provisions are identical, frequently *totidem verbis*.

Compare the language of Section 327, which is printed in italics on page 4 of the supplemental brief, with this language of Clause Second of paragraph 3:

> "*And that all complaints and objections that may be made in writing* concerning the proposed improvements, *by the owner of any real estate to be assessed, will be heard and determined by the* board *before final action of the* board *thereon.*"

And this language of Clause Fifth:

> "The resolutions and orders of the board of public works may be modified, confirmed or recinded (rescinded) by said board at any time prior to the passage of the ordinance authorizing the improvements."

The error into which learned counsel have fallen seems to result from the use of the word "*apportionment*" in Section 327. This word is not found in the provisions of Section 3 of Article 7, to which we have alluded. The reason is that the improvement there provided for and involved in the LONDONER case in the Su-

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IN THE

Supreme Court of the United States

NO. 110

OCTOBER TERM, 1919.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,
Plaintiffs in Error,

VS.

THE CITY AND COUNTY OF DENVER, ET AL.,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action arose under the provisions of the charter of the City and County of Denver concerning special assessments for local improvements consisting of the creation of parks and parkways.

The City and County of Denver, by its charter, is divided into four park districts, among which is the East Denver Park District, and under the provisions of the charter with reference to public improvements a certain park scheme was established. This general scheme included

what is known as the "Civic Center"; and also included other parks and parkways, and the creation and improvement of certain boulevards and streets.

The general system provided by the charter, by which these public improvements are provided and the cost thereof assessed to property benefitted, is similar to other provisions which have been adopted in other cities in other states of the United States.

This action was brought in the District Court of the City and County of Denver, seeking to enjoin the City and its representatives from enforcing an assessment ordinance which had been passed for the purpose of collecting the moneys necessary to pay for the improvements in question. A number of objections were urged in the original complaint and the amendment thereto, and petitions in intervention filed, why the relief sought should be given, but counsel here now relies upon plaintiffs' assignment of error numbered 6 (trans. of record, p. 65, fol. 120; brief of plaintiff in error, p. 9). Briefly stated this assignment of error complains that Sec. 300 of the charter of the City and County of Denver does not afford due process of law and constitutes the taking of property without due process of law, and is, therefore, obnoxious to the fourteenth amendment to the constitution of the United States.

The amended complaint in the case was demurred to by the City and County of Denver, and the demurrer was, by the District Court, sustained. The plaintiffs elected to stand on their complaint and the case then went to the Supreme Court of the state.

The particular section of the charter which counsel claims is in violation of the rights of plaintiffs is Sec. 300. This is the same section of the charter which was passed upon in Londoner v. City and County of Denver, 210 U. S. 373, which section was then numbered 31, but to be fully understood it is well to have before the Court also Sections 298 and 299. The sections referred to are as follows:

"Section 298. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof affording complete drainage for any part or parts of the district, and upon acceptance thereof by the board, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board shall prepare a statement, showing the whole cost of the improvement, or such parts thereof, including not to exceed six per cent additional for costs of collection and other incidentals, and including interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this state made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as in this article provided; and shall cause the same to be certified by the president and filed in the office of the clerk.

Section 299. The clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed, and all persons interested, generally and without naming such owners or persons, that said improvements have been or are about to be completed and accepted, specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land or persons; and that any complaints or objections that may be made in writing by such owners or persons to the board of supervisors and filed with the clerk within sixty (60) days from the first publication of such notice, will be heard and determined by the board of supervisors at its first regular meeting after said sixty (60) days and before the passage of any ordinance assessing the cost of said improvements.

Section 300. At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modifications of their apportionments; the board of public works may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the cost of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

The sections just quoted follow other provisions of the charter concerning the preliminary steps to be taken before this stage of the proceeding is reached, and refer to the assessment of property generally for local improvement purposes, but these same sections, 298, 299 and 300, are readopted by reference in Section 328 of the charter, and made applicable to the assessments for public parks. This section is as follows:

"Section 328. When the cost of any such park site or parkway is definitely determined, the park commission shall prepare, certify and file with the clerk a statement showing the cost thereof as required in Section 298 hereof; the clerk shall thereupon give the notice required by Section 299 hereof; and thereupon the same proceedings required in Section 300 hereof shall be had, except that the proceedings therein provided to be observed by the board shall be observed by the park commission; and the council shall thereupon by ordinance assess the cost against the other real estate as aforesaid, in the district, in accordance with said apportionments."

In the District Court, as well as in the Supreme Court below, the City contended that the provisions of the charter did constitute due process of law; that by the provisions of the Charter an opportunity was afforded to all taxpayers affected to be heard as to the justness of the assessment, and that the board before whom such hearing was had, had power to determine such objections.

Section 299, above quoted, provides for a publication in some newspaper of general circulation for a period of ten days, in order that all persons interested may file complaints or objections with the Board of Supervisors, and provides that all objections that may be filed within sixty days from the first publication shall be heard at the first regular meeting after said sixty days, and before the assessing ordinance is passed. Then Section 300 follows, in which the hearing, that the City contends complies with the provisions of the federal constitution, is contained.

The plaintiffs in this case made no effort whatever to file any complaints or objections to the assessments or to the apportionment that had been made by the park commission, although notice was given them, but waited until almost three months after the assessing ordinance had been passed, and then went into the District Court and commenced this action.

It is contended by counsel for plaintiffs that Section 300 of the charter does not afford due process of law, for the reason that the board of supervisors sitting as a board of equalization, before whom the hearing is to be had, had no power to hear and determine, but only power to recommend to the board of park commissioners the apportionment to be made in the assessment. If this was the first time this question had been raised, or the first time that this section of the charter had ever been considered by the Courts, it might be that the issue presented would be debatable, but the same identical question has been determined by the Supreme Court of the State of Colorado at least six independent times.

The section of the charter in question was first adopted in 1893, and from that time down to the present time its provisions have been acted upon and improvements have been made, and bonds issued, on the strength of the charter provision and the construction which the Courts of Colorado have given to it. And not only has the Supreme Court of the State of Colorado construed this statute as not obnoxious to the fourteenth amendment to the constitution of the United States, but this Court as well, in *Londoner v. Denver*, 210 U. S. 373, 380, has also held that the same section "is clear of *all* constitutional faults."

ARGUMENT.

Preliminary Proceedings.

The allegations in the amended complaint here under consideration, in reference to the preliminary proceedings, are practically identical with the matters that were considered by the Supreme Court of Colorado in the case of Londoner v. The People, 52 Colo. 15. It has been held repeatedly by the Supreme Court of Colorado that the regularity of the preliminary steps, the sufficiency of petitions of remonstrance, and all other questions preliminary in their nature to the passage of the assessing ordinance do not affect the constitutional rights of the taxpayer, and the same principle was held also by this Court in the Londoner case in 210 U. S. 373. Both Courts hold that these requisites might have been dispensed with altogether by the law-making power, and that the City could have acquired lands and made the proposed improvement without any preliminary proceedings whatever. It is only necessary at some stage in the proceedings that the property owners be given a hearing as to the apportionment of the tax.

As was said in City of Denver v. Londoner, 52 Colo. 15, 25:

> "This constitutional right is fully protected by the notice which the charter, Sections 299 and 328, requires shall be given by the city clerk, and the proceedings in accordance therewith afford the owners full opportunity to be heard on the question of assessments against their property."

See also:

Denver v. Dumars, 33 Colo. 94, 101;
Page & Jones on Taxation by Assessment, Secs. 125, 779 and 811;
Chase v. Trout, 146 Cala. 350, 359.

It is therefore respectfully submitted that all those allegations in plaintiffs' bill relating to the irregularity of the preliminary steps, such as the determination of the park board to acquire the lands and parkways, as to whether such lands were to be used for parks or parkways, as to whether sufficient petitions of remonstrance were filed, and as to whether fraud occurred in the taking of such preliminary steps, are foreclosed by the decision in the Londoner case, 52 Colo. 15, and by the other authorities referred to. Such questions are now no longer open to litigation, either by the plaintiffs in error in this case or any other taxpayer in the East Denver District. After these preliminary proceedings were had the assessing ordinance was passed, which declared the existence of the essential facts, and, as said by the Supreme Court of Colorado in the Londoner case just referred to:

> "This ordinance has the effect of a statute, and the mandate of the people of the municipality expressed through their charter is that such findings shall be conclusive upon every Court or other tribunal."

DUE PROCESS OF LAW.

Counsel has devoted a number of pages in his brief to the proposition that in order to afford due process of law an opportunity must be afforded to be heard before a tribunal with jurisdiction to determine. There is no question but what the general rule is, in taxation proceedings, whether in general taxation or taxation by local assessment, an opportunity must be afforded at some stage in the process of taxation for the taxpayer to be heard, and before a tribunal competent to hear, or the taxing law is obnoxious to the federal constitution.

In the present case the Supreme Court of Colorado has held that Section 300 of the charter did afford due process of law. It also held that the same question had been decided by it before, in cases in which the identical question had been raised. It also held that in the case of Londoner v. Denver, 210 U. S. 373, this Court had passed upon the same question and decided it in favor of the City, but counsel states that the question was neither presented to, nor decided by, the Supreme Court of the United States; also that the Supreme Court of the state did not pass upon the particular question, now raised for the first time.

In the case of *City of Denver v. Londoner,* 33 Colo. 104, the same case that was afterwards taken to this Court and reported in 210 U. S., *supra,* Section 300 of the charter was construed. It was construed in a manner to set at rest all the objections now made by counsel. Counsel now says that the only question passed upon by the Court was the question as to notice, and as to whether or not the failure to provide notice in the charter made it constitutionally objectionable, and that the wonderful discovery that he has now made was not passed upon at all. But the Supreme Court of Colorado passed directly upon both questions. It did pass upon the question of notice. It also construed the

charter and put a construction upon it which would render it in harmony with the "due process of law" provision of the federal constitution, in the following language:

> "When these proceedings have reached that stage where the board has concluded that in its judgment the improvement should be ordered, it recommends an ordinance which, however, can only be passed by the city council. It is not obligatory upon the latter to pass such ordinance. If, after considering the necessity of the improvement, the cost thereof, and the materials which are to be employed in its construction, the district to be assessed with the expense—in short, any and all matters relating to the improvement—it is of the opinion that the improvements should not be made for any reason, it is in the discretion of the council to refuse to pass the ordinance. If such ordinance is passed by the city council the contract for the work is not let by the board of public works, but by the mayor. When the work is completed it devolves upon the board of public works to make a preliminary apportionment of the expense on the property benefited thereby. As to certain improvements the legislature has directed how such apportionment shall be made. This, however, is not the levy of a tax by the General Assembly, but merely a rule adopted by that body for the apportionment of the cost of an improvement by the municipal authorities. This apportionment is certified by the board and filed with the clerk. The latter is then required to give notice to the owners of property to be charged with the expense of the improvement to file such complaints and objections touching the apportionment made as they may be advised. These objections are to be heard and determined by the city council, and it

is only after they have passed upon such objections as the owners may have interposed to the recommendation of the board of public works on the apportionment of the cost of the improvement that the city council is authorized to pass the assessing ordinance which makes the apportionment a lien upon the property chargeable therewith. This action constitutes the levy. So it appears that at all times the board is powerless to order any improvements, create a district, or levy assessments, but that all these matters are left to the action of the city council. But it is argued that in reality and to all practical intents and purposes it is the board of public works, and not the city council, which makes the assessment, because of the provisions in the charter—Sec. 31, Art. VII (Sec. 188) —which counsel for appellees insist leaves the city council without any discretion in passing the assessing ordinance after the recommendations of the council have been reviewed by the board. Notwithstanding the apparently mandatory words employed in Section 31, *supra,* we do not think that thereby the legislative power and discretion of the city council is taken away and vested in the board of public works, but that the former, in the exercise of its functions, *is empowered to pass an assessing ordinance charging property with the cost of an improvement, which, according to its judgment, would be just and equitable.*

In the case of the Board of County Com'rs. v. Smith, 22 Colo. 534, it was held that 'may' must be construed as 'shall' when an act of the legislature can be thereby upheld, if a contrary construction would render it obnoxious to a constitutional inhibition. The converse of this must be likewise true; and hence we conclude that if the

provisions of section 31 are objectionable because apparently mandatory upon the city council, they do not strip the latter of its legislative authority and discretion, but still leave it with the authority to pass an assessing ordinance in accordance with its own judgment. So far as urged upon our attention, we find no provisions of the charter relating to the board of public works or local public improvements which are unconstitutional." 33 Colo. 115-117.

This decision was rendered by the Supreme Court of the State in 1905, more than eight years before the present action was commenced. The Supreme Court of Colorado emphatically said that the action of the City Council in hearing and determining the grievances of the taxpayers was final, and that the City Council (or Supervisors) could, in the exercise of its judgment and the power intended by the section of the charter, finally determine the matter. It makes but little difference, as will be shown hereafter in this brief, whether the Supreme Court of Colorado was right or wrong in the construction that it placed upon this statute; it was a construction placed upon the statute by the highest court of the State of Colorado, and the statute as construed was not obnoxious to the Federal Constitution. A taxpayer could feel assured that if he followed the procedure provided by the charter he would be heard before a tribunal that had jurisdiction to determine his complaint and objections. The objection raised here is to a State statute, or rather a charter provision; it is not as to the method in which it was administered, and the statute is to be viewed, when the question reaches this Court, with the construction that the Supreme Court of the State has previously put upon it; but this matter will be separately treated in this brief under another topic.

The same question as involved in the Londoner case was also involved in the case of *City of Denver v. Dumars*, 33 Colo. 94, and in the case of the *City of Denver v. Ken-*

nedy, 33 Colo. 80, and again, in the case of *Spaulding v. City of Denver*, 33 Colo. 172.

In the case of *Pueblo v. Colorado Realty Co.*, 44 Colo. 590, the Supreme Court also adhered to the doctrine as laid down in Londoner, Kennedy and Dumars cases. This case arose under a general statute of the State with reference to public improvements, but the language of that statute is identical with Sec. 300 of the charter, now under consideration.

After the Londoner case was decided in 33rd Colo., the case was brought by writ of error to this Court, and decided in 210 U. S. 373.

Counsel criticizes the decision of our Supreme Court in the present case, and says that the precise question here involved could not be said to have been passed upon by the State Supreme Court in Londoner v. Denver, 33 Colo. 104, and that when Mr. Justice Moody wrote the opinion in the same case he did not have in mind the point now under discussion. He also says that the assignments of error in 210 U. S. were not broad enough to cover this question; but a reference to the 9th assignment of error, quoted on page 375 of the opinion in 210 U. S., shows that the identical question was under consideration, and if the Court cares to take the trouble to refer to the briefs filed in that case it will be found, on page 52 of the reply brief of plaintiff in error, that this question of the construction that the Colorado Supreme Court had put upon the statute was discussed. So, therefore, when this Court held that Sec. 31 (now 300) of the charter was clear of all constitutional faults, it had before it the ruling of the Supreme Court of Colorado placing a construction upon the statute, an assignment of error directed to the statute itself, and an argument of counsel in which the construction placed upon it by the Supreme Court was criticized and attacked. The whole matter was fairly presented to this Court and it held, referring specifically to this 9th assignment of error, as follows:

"The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the charter. This may be found in the judgment under review and two cases decided with it ,Denver v. Kennedy, 33 Colo. 80; Denver v. Dumars, 33 Colo. 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council, the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by Sec. 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant,' 33 Colorado, 97; *and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board.* THE STATUTE ITSELF THEREFORE IS CLEAR OF ALL CONSTITUTIONAL FAULTS. It remains to see how it was administered in the case at bar." (Italics ours.)

The discussion by Mr. Justice Moody of the 5th assignment of error was entirely independent of the discussion of the 9th assignment. After holding that the section of the charter itself was free from constitutional faults, he introduces the discussion of the 5th assignment by saying: "It

remains to see how it was administered in the case at bar," and then this Court proceeds to hold that the manner in which the statute was administered rendered the action of the public authorities void, as being in contravention of the Federal Constitution.

STARE DECISIS.

It will be seen that the only possible question involved in this case is the question as to whether or not Sections 299 and 300 of the charter afford a hearing, because all the objections to the preliminary steps in creating the public improvement in question are settled by the assessing ordinance, declaring that the preliminary steps have been complied with. This declaration made in the ordinance was authorized by charter, and forecloses, according to all the authorities, the examination into all matters, except the hearing which the taxpayers are entitled to before the assessment is made.

The maxim or rule of *stare decisis* is a rule of policy, a rule affecting the practical administration of justice.

The particular sections involved—Sections 299 and 300 of the charter—have been directly ruled upon five times by the Supreme Court of Colorado, and a similar section of the general statutes of the State has also been ruled upon by the Supreme Court of the State. Four of the cases were decided in January, 1905, eight years before the assessing ordinance in question was passed; and the identical question involved was also passed upon in the case of *Brown v. City of Denver*, 7 Colo. 305, decided in 1884, and as said before when the case of City of Denver v. Londoner, 33 Colo. 104, was brought to this Court, and decided in 210 U. S., this Court held that the sections of the charter in question afforded due process of law. And the cases referred to, all having decided that the sections of the charter in question provided for a hearing and determination as

to the only step in the proceedings in which the property owner is guaranteed a hearing by the constitutions, both Federal and State, the rulings of the Court have become a rule of law that is as binding as an act of the legislature, or as binding as an act of Congress would be, and even though there might have been a basis for argument as to the accuracy of the decisions of the courts, nevertheless when, as here, a long period of years has elapsed since the adoption of the rule; when property rights have become affected, and when contractual obligations have been entered into based upon the rule, the application of the maxim of *stare decisis* should be invoked to its fullest extent.

Practically all of the public improvements of Denver, including the laying of sewers, paving of streets, the laying of sidewalks, building of viaducts, the acquiring and beautifying of the numerous parks of the City, resulting in the issue of millions of dollars of public improvement bonds now outstanding in the hands of innocent purchasers, were made and done under the provisions of these two sections of the charter. Opinions have been given by eminent attorneys construing the charter provisions in question and giving an interpretation to the decisions of the State Court and this Court concerning the same, to the effect that the charter provisions afforded due process of law; that this Court had so held, and the rule thus established, as has been said before, assumes the dignity of a legislative enactment, and is now beyond the power of the Court to change.

It is said in the case of *American Mortgage Co. v. Hooper*, 12 C. C. A. 293:

> "An adherence to the doctrine of *stare decisis* is undoubtedly necessary to preserve certainty and uniformity in the stability and symmetry of our jurisprudence. When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principles thus

announced have been long established, frequently recognized, and conformed to, and property rights have been acquired thereunder, it has generally been held that such decisions should not be overturned, although the principles announced therein might otherwise be questioned."

Another leading case, and a case involving the question of *stare decisis* as applied to special assessment cases, is the case of Schumacker, et al. v. City of Cincinnati, 68 N. E. 1 (O.).

See also:

Harvey v. Travelers Ins. Co., 18 Colo. 354;
People ex rel. v. LeFevre, 21 Colo. at p. 241;
Schultz v. Pac. R. R. Co., 36 Mo. 13.

RES JUDICATA.

The Supreme Court below not only held that the matters involved in this case were *stare decisis,* but also held that the same identical matter had been adjudicated in 52 Colo. 15. The Court's opinion in this behalf is found in 171 Pac. at pages 68 and 69, and is as follows:

"In Londoner v. City and County of Denver, 52 Colo. 15, 119 Pac. 156, the allegations of the complaint are substantially the same as in this case. The Londoner suit was brought on behalf of the plaintiff and all others similarly situated in the East Denver Park District. It was alleged, as here, that the rules for apportioning the benefits were unreasonable and unjust; that there were irregularities, inconsistencies, conspiracy and fraud in the preliminaries relating to the notices, protests, remonstrances, and the permission given to some protestants to withdraw their objections. The question of the power of the City to acquire land except by bond issue regularly approved by

the electors, and whether the charter provisions provided due process of law, were also at issue. In that suit, as here, the cause was dismissed on demurrer. * * *

The constitutionality of the provisions of the charter as to hearing of complaints by the board of supervisors is not only settled by the rule of *stare decisis*, but is also *res judicata*, for in Londoner v. Denver, 52 Colo. 15, 119 Pac. 156, plaintiff brought suit upon behalf of himself and all others similarly situated in the East Denver Park District. Plaintiffs in error here were, and are, similarly situated, and they not only could have participated therein, but should have done so, and for this reason the judgment in that case is binding on them. Freeman on Judgments (4th Ed.) 178; 2 Van Fleet's Former Adjudication, 569, 570; Clark v. Wolf, et al., 29 Iowa, 197,207; State ex rel. Brown v. C. & L. R. R. Co., 13 S. C. 290; Lyman, et al. v. Faris, et al., 53 Iowa, 498, 5 N. W. 621; Harmon v. Auditor, etc., 123 Ill. 122, 13 N. E. 161, 163, 5 Am. St. Rep. 502; Canon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Ashton v. City of Rochester, 133 N. Y. 187, 30 N. E. 334, 28 Am. St. Rep. 619, 623; 23 Cyc. 1269."

The Supreme Court of Colorado had before it the records of both cases, both in the Londoner case and the present case. It could take judicial notice of its own records, and did determine that not only the matter at issue, but the parties, were identical, for the reason that the former case, having been brought by Londoner and others similarly situated, included all the property owners in the taxing district in the first adjudication. So, therefore, not only were the same legal questions in the present case that had been involved and determined in the Londoner case, but the cause of action, the subject matter and the parties were all the same. This latter—the Londoner case—was not brought to

this Court; the action of the Supreme Court of the State became final as to all questions, both State and Federal.

As to the right of the Supreme Court of Colorado to take judicial notice of its own records, see:

15 R. C. L., p. 1115, Sec. 44;
DeBearn v. Safe Deposit, etc. Co., 233 U. S. 24, 32;
Dimick v. Tompkins, 194 U. S. 540, 548;
Hancock v. Diamond Plate Glass Co., 75 N. E. 659, 663 (Ind.);
Chicago Herald Co. v. Bryan, 92 S. W. 906 (Mo.).

In the case of *Southern Pacific R. R. Co. v. U. S.*, 106 U. S. 1, the Court held as follows:

> "A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Where, in a case of this character, a suit is brought by a party and others similarly situated, all of those who are similarly situated become parties to the action, at least insofar as the question of *res judicata* is concerned.

City Council of Montgomery v. Walker, 45 So. 586 (Ala.);
State ex rel. Forgues v. Superior Court of Lewis Co., 120 Pac. 313 (Wash.);
Ashton v. City of Rochester, 133 N. Y. 187;
Gallaher v. Moundsville, 34 W. Va. 730.

The cases just cited all involve taxation questions and pertained to matters of general concern, in which it was proper to join others similarly situated.

SPECIAL BENEFITS.

The plaintiffs in error in their complaint attempted to raise an issue based on the allegation, among others, that the special benefits were not commensurate with the assessment against their property, but an examination of the allegations will disclose that such allegations were so indefinite as to raise no issue. They were to the effect that the pretended assessments were made without ratio, without proper apportionment and without any defined plan or scheme; that the pretended benefits were guess-work, purely chimerical and have no reasonable proximation, and cannot be arrived at from any conceivable benefit that said property might now or hereafter derive from the acquisition of said lands or the improvements connected therewith.

It is also alleged in general terms that the assessments are individual, and if any benefits are derived they are derived on account of certain business advantages, rather than general advantages to all of the property involved. The objections, as shown by the complaint, are so general in character as to not form any basis for a determination as to whether or not the property of the plaintiffs is benefited or not.

No citation of authority is necessary to establish the proposition that such allegations present no issue. The allegations must be such that the Court would be enabled from them to determine whether the property in question was specially benefited or not, and it should not be left to conjecture as to whether, or in what amount, the property was benefited.

It, therefore, follows, that these allegations with reference to special benefits are the mere ultimate conclusions of the pleader, and allege no facts from which a Court could determine whether the property was benefited or not. Whether the improvement benefiited the property or not is a question determinable from the facts, and the facts are

within the knowledge of the pleader and should be set forth in such a manner that the Court could determine from them whether or not any cause of action existed.

But let us assume that the facts stated were sufficient for the Court to conclude that the property involved was not specially benefited, or that it was not benefited at all. In such case unless the property owner pursued the remedy provided by the charter, and filed objections under the provisions of Sec. 299 thereof, he would be estopped from questioning the decision of the board of supervisors, sitting as a board of equalization, for Sec. 300 of the charter provides the forum and the method for determining complaints and objections that may be raised by property owners, and it is the only and exclusive tribunal before whom complaints may be made.

As was said in the case of Londoner v. Denver, 52 Colo. at p. 34:

> "Plaintiff concedes, and we have frequently held, that should a property owner defer action until the city council has, by ordinance, determined the matters committed to it, such findings are conclusive, and the property owner is precluded from questioning the same."

There is no fraud charged in the bill against the members of the council in passing the assessing ordinance, and therefore the council, having acted in passing this assessing ordinance, and having had jurisdiction to pass upon the subject matter contained in the ordinance, even though the preliminary steps with reference to the public improvement might have been erroneous, the plaintiff here would be remediless, unless they had availed themselves of the remedy provided by the charter and had filed their objections in the manner provided by the charter.

In this case there were no allegations of fraud against the council; there were no allegations that the assessing ordinance was not passed regularly and in the manner provided by law. There are no allegations that the council, in the exercise of its power in hearing and determining the complaints that might have been filed by property owners, acted in a fraudulent manner or that their action in that behalf was not regular. In the passage of the ordinance in which the assessment was made the council found that the various tracts of land and lots included in the district were specially benefited, and that the assessments were made in accordance with the benefits accruing and resulting to the several tracts included. This finding of the council after the assessing ordinance became a law is not now open to attack.

Page & Jones in their work on Taxation by Assessment, Vol. 2, Sec. 1027, say:

> "In many statutes provisions are found which point out the method in which the property owner must object to defects or irregularities in the proceedings. It is generally held that if a fair and ample opportunity is given to the property owner to be heard by virtue of such statutory provision, he must make his objection in the manner pointed out by statute, and that if he does not object, he cannot subsequently resist or attack the assessment for reasons which he might have urged in the method provided for by statute. The loss of such defenses to the property owner is sometimes referred to principles of estoppel, though it is also occasionally spoken of as waiver, or as laches, or as resting upon the principle that proceedings cannot be attacked collaterally."

The same authors, at Sec. 1026 of their work, say:

> "A common example of the foregoing principle exists where the statute contemplates the formal presentation of objections, remonstrances, protests, and the like, at a certain stage of the assessment proceedings. If the property owner fails to make such formal objection at the stage required by statute, he is precluded from making such objection at a later stage, when the improvements have been completed, the benefits secured to his property, and the assessment levied."

The foregoing text from Page & Jones is supported by cases from practically every state in the United States.

As was said in the case of *Voigt v. Detroit City*, 184 U. S. 115, 122:

> "And it is only with the charge upon him that he is concerned, *and of that alone can he complain.* In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The Supreme Court of the State decided, as we have seen, 'that the amount of the taxes which may be assessed upon the district, or upon any given parcel of land, cannot exceed the benefits.' On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax." (Italics ours.)

To the same effect is the case of *Goodrich v. Detroit*, 184 U. S. 432, 438, where this Court says:

> "Thus in *Spencer v. Merchant*, 125 U. S. 345, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of lands benefited thereby, and also de-

termine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray (p. 356): 'But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.' So, in *Parsons v. District of Columbia,* 170 U. S. 45, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike of the necessity of the work and of its benefits to all abutting property. So, also, it was said in *Williams v. Eggleston,* 170 U. S. 304, 311: 'Nor can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the

question whether the property so included within the taxing district is in fact benefited.' Cooley on Taxation, 2nd ed., p. 149.

This question, however, is decided in the case of *Voight v. Detroit City, ante,* p. 115, recently disposed of, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that."

In the case of *Londoner v. Denver,* 52 Colo., 11, 25, it was said:

"It is ordinarily a legislative function to create special taxing districts and to charge the cost of a local improvement therein, in whole or in part, on the property benefited in proportion to the benefits thereto. *Webster v. Fargo,* 181 U. S. 394. And the charter of the city and county of Denver, adopted in obedience to an express mandate of the constitution of the state, with respect to municipal matters, including the creation of taxing districts for local improvements and special assessments for the cost of the latter, has all the force and effect of an act of the legislature. The East Denver Park District was so created and the proposed improvement authorized. Under these circumstances, the only constitutional right possessed by the property owner, as to the making of the proposed improvement, is to a hearing upon the question of what is termed, the apportionment of the tax; i. e., the amount of the tax which he is to pay. *Voigt v. Detroit,* 184 U. S. 115; *Goodrich v. Detroit, idem,* 432.

This constitutional right is fully protected by the notice which the charter, Sections 299 and 328, 'requires shall be given by the city clerk and the

proceedings in accordance therewith, afford the owners full opportunity to be heard on the question of assessments against their property.' Denver v. Dumars, 33 Colo. 94, 101."

Notwithstanding that notice had been given to these plaintiffs and other property owners in the district, informing them of the apportionment of the taxes on their property, they failed to appear before the board of supervisors for the purpose of protesting against the assessment against their respective properties or to point out any inequalities in the apportionment, or to point out any illegality of the assessment attempted to be laid against them, but they stood idly by and permitted the property to be acquired, the expense to be undergone and the bonds to be issued and sold by the City and County of Denver. As a result of their quiescence they received whatever benefits might accrue to them, whether commensurate with the assessment or not, and now, having received those benefits, the improvement having been completed, they seek to escape their share of the burden for the improvement.

There is another charter provision contained in the charter of the City and County of Denver, passed for the obvious purpose of preventing just such an unfair condition as would be here presented. This provision of the charter is to the effect that property owners are given thirty days after the assessing ordinance has been passed within which to come in and pay their tax, if they do not wish to pay it in the installments provided in the charter. If they pay the tax within thirty days a cash discount is allowed. This thirty-day provision is also a statute of limitations, and the Colorado Supreme Court has held that it effectually bars all matters which are or may be raised with reference to statutory proceedings. Among other things the section provides:

"All persons so electing to pay any installments shall be conclusively considered and held as consenting to said improvements, and such election shall be conclusively held and considered as a waiver of any and all right to question the power or jurisdiction of the city and county to construct the improvements, the quality of the work, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessment."

In the case of *City of Denver v. Campbell*, 33 Colo. 163, in discussing this section of the charter the Court said:

"The purpose of Section 34 is to prescribe the period when preliminary steps of the character under consideration are finally and conclusively settled, and the owner inhibited from making an issue on them. In effect, it says to the owner: If you do not pay your assessment within thirty days after the publication of the assessing ordinance, you will be conclusively presumed to have elected to pay it in installments, and, having made this election, you are precluded from thereafter raising any question with respect to the steps taken, or the regularity of the proceedings, which are purely statutory, and not required by virtue of any provision of the constitution. The omission to raise any of these questions before the presumption attaches that the preliminary steps of the character under consideration have been taken is a bar to raising them thereafter. The section does not state that a suit must be commenced before this presumption attaches, but its effect in this respect is to bar any action the purpose of which is to put these questions in issue, unless commenced before that period, when, according to the terms of the section, presumptions attach which cannot be rebutted."

And again, on page 171, the Court says:

"In conclusion, it is perhaps not amiss to add, although not deciding the point, that the trend of the decisions of recent years, involving questions affecting the validity of municipal improvements, is to be less technical than formerly, and to require owners whose property may be assessed for such improvements to be at least reasonably diligent in protecting their rights before the improvements are completed. Lord v. Bayonne, 46 Atl. (N. J.) 701; Lewis v. Albertson, 53 N. E. (Ind.) 1071; Arnold v. City of Ft. Dodge, 82 N. W. (Iowa) 495; Clinton v. City of Portland, 38 Pac. 407.

Elliott, in his work on Roads and Streets (2nd ed.), says: 'There is sound reason for extending, rather than abridging, the principle of estoppel in street assessment cases.'

Owners ought not to be permitted, by their silence, to mislead contractors, municipal authorities, and those supplying the money to pay for improvements by the purchase of bonds, respecting matters which could have been corrected had the attention of the municipal authorities been called thereto in apt time."

In Wagner v. Baltimore, 239 U. S. 207, 218, it is said:

"It is further urged, and much stress seems to be laid upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this Court. This sasessment, and the classification of the property to be improved, were

fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front. We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution."

STATUTORY CONSTRUCTION AND THE EFFECT OF THE STATE COURT'S CONSTRUCTION UPON THE SUPREME COURT OF THE UNITED STATES.

The Supreme Court of the State of Colorado, as has been before said, has placed a construction upon Sections 299 and 300 of the charter (formerly Sections 30 and 31 of the charter.) In the case of the *City of Denver v. Londoner*, 33 Colo., at p. 117, the Court holds that Sec. 31 of the charter does not take away from the legislative power the discretion of the City Council, and that it does not vest this discretion in the board of public works (park commissioners), and other decisions of the Colorado Supreme Court have also upheld this same construction.

It has frequently been held that the construction of the highest judicial tribunal of the State forms a part of its statute law as much as an enactment of the legislature.

In the case of *Costillo v. McConnico*, 160 U. S. 674, 680, the Court says:

> "The plaintiff in error has no interest to assert that the statute is unconstitutional because *it might be construed* so as to cause it to violate

the constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

Also, in the case of *St. Louis Land Co. v. Kansas City,* 241 U. S. 419, 427, this Court says:

> "The extent of the authority conferred upon the city by its charter, the construction of the various provisions of the charter, the validity, scope and effect under the state law of the ordinances adopted by the city, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions as to which the decision of the state court is controlling."

In the case of *Baltimore Traction Co. v. Baltimore Belt R. R .Co.,* 151 U .S. 137, it is said:

> "The Supreme Court has no jurisdiction of an error to a state court in condemnation proceedings, on the ground that the condemnation statute is repugnant to the 14th amendment, in that it fails to provide for notice, when the highest court of the state has already decided that the statute does require notice."

The case just referred to cites the case of *Green v. Neal,* 6 Pet. 291, a case tried in this Court in 1832. In the course of the opinion the Court says at page 297:

> "In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions consti-

tute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope. • • • On all questions arising under the constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court, not because the state tribunal, in such a case, has any power to bind this court; but because, in the language of the court, in the case of *Selby v. Guy*, 11 Wheat. 361, 'a fixed and received construction by a state in its own courts, makes a part of the statute law. • • • If the construction of the highest judicial tribunal of a state form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alterations in a statute; and why should not the same rule apply, where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it? The charge of inconsistency might be made, with more force and propriety, against the federal tribunals, for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they

reject the exposition of that law, which forms a part of it. It is no answer to this objection, that a different exposition was formerly given to the act, which was adopted by the federal court. The inquiry is, what is the settled law of the state, at the time the decision is made. This constitutes the rule of property within the state, by which the rights of litigant parties must be determined. * * * It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a state."

Counsel for plaintiffs states that the question now under discussion was not passed upon in the Londoner case, 33 Colo. 104, but that only the question of notice was passed upon. The quotations from that case show to the contrary, and furthermore, it would be a reflection upon the intelligence of the Supreme Court of the State of Colorado to say that when Section 300 of the charter was presented to it for determination, it did not consider the most vital part of the meaning of such charter provision. And not only has the Supreme Court of the State, as well as this Court, placed a construction upon this statute, but a reference to the assessing ordinance in the present case (Trans. pp. 26-30) shows that this construction was also followed by the city authorities. It recites that the board of supervisors (corresponding to the City Council) of said City and County, sitting as a board of equalization, did, pursuant to, and in accordance with, Sec. 300 of said charter, duly hear and determine each and all of said complaints and objections so filed, and did overrule the same, and did recommend to the Park Commission of said City and County that no modification of its apportionments of said assessment, as set forth in said notice, be made, save and except that the proposed assessment against Lots 3 and 4, Block 146, South Division of Capitol Hill, etc., be

reduced. It then shows that the apportionment as determined by the board of equalization was, by the park board, adopted, and notwithstanding that Sec. 300 of the charter in question might be subject to the interpretation that the board of supervisors did not have the final determination of the matter, their action, nevertheless, was treated as final and no change was made by the park board, but the action of the supervisors was adopted.

It is really unimportant, in view of the opinion in the case of *Paulsen v. Portland*, 149 U. S. 30, whether the board of supervisors were given the final power of determination or the park commission, for under the authority of that case the right given to the City must necessarily be exercised subject to all the limitations imposed by constitutional provision, and where a body is provided for determining objections that may be filed, and the charter is silent as to the notice or the time of hearing, the authority will be implied in the body holding the hearing to fix the time and place of notice, and to do whatever is necessary to comply with constitutional requirements. On page 38 of the opinion just referred to, Mr. Justice Brewer says:

> "But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of the property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limita-

tions imposed by constitutional provisions, and and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of *Gilmore v. Hentig*, 33 Kansas, 156, it was held thus: 'Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, *held*, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same.' "

So, therefore, the Supreme Court of the State of Colorado would have had the right to have adopted perhaps a different construction of this statute, and had they adopted a different construction, and had they also in that construction brought the charter provision within constitutional limitations, then the charter provision would not have been obnoxious to the Federal Constitution. The construction placed upon the charter by the Supreme Court of the State is much more important, from a constitutional standpoint, than the wording of the statute or charter provision itself, for not until the Supreme Court of the State has passed upon a statute is its interpretation or construction finally determined.

CONCLUSION.

Had the defendants in error herein filed a motion to dismiss and affirm, under the rules of procedure of this Court it would have been the duty of this Court to sustain such motion, and it is the duty of this Court now to take similar action, for the reason that in the case of *Londoner v. City and County of Denver*, 210 U. S. 373, all of the questions that could possibly be raised by the issues in this case were finally passed upon and determined, and this case should be dismissed upon the authority of that case.

The State of Colorado, commencing as far back as 1884, has announced principles of law which are controlling as to the constitutionality of Sec. 300 of the charter. It has passed upon the same identical section at least five times. It has thereby established a rule of property in Colorado, under which contracts have been made, bonds have been issued and investments have been made therein. The report of the city auditor of the City and County of Denver shows that the total issue of bonds in the present case was $2,685,000; that of said amount $1,435.000, or more than half, have been paid off. The lands for these public parks have all been purchased and paid for, and they have been improved, and all of the property owners in the district have received the benefits thereof, and therefore, the rule of *stare decisis* should be applied to its fullest extent. But not only should the rule of *stare decisis* be applied, but the rule of *res judicata* as well, for in a former proceeding the same parties were before the courts of Colorado; the decision was adverse to them; they carried the case to the Supreme Court of the State, where the decision was also adverse. The Supreme Court of the State has said that both the subject matter and the parties are identical, and rendered its decision based upon, among other things, this bar.

Colorado has placed a construction on the sections of the charter in question; its Court of last resort has so construed them that they are not obnoxious to the Federal Constitution, and in determining what the statute means in Colorado it is necessary to read this decision of its final Court into the same. It is, therefore, the duty of this Court to follow the construction placed upon the charter provisions by the Supreme Court of the State. To say otherwise would be to say that in the Federal Courts a judgment would be one way, but in the State Courts another. It is the duty of the Colorado Court to follow the rule of *stare decisis* that it has established, and it can do nothing else than to uphold the provisions.

We therefore respectfully submit that the action of the Supreme Court of the State should be affirmed, or that this writ of error be dismissed for the reason that no sufficient question is raised to justify this Court to enter into a determination on the merits.

Respectfully submitted,

James A. Marsh,
Norton Montgomery,
Attorneys for Defendants in Error.

NO. 119

OCTOBER TERM, 1919.

[redacted] Donahue Hardy, [redacted]

Plaintiff in Error,

vs.

[redacted] County Court of Denver, et al.,

Defendants in Error.

Error to the Supreme Court of the State of Colorado.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

James A. Marsh,
Norman Montgomery,
Attorneys for Defendants in Error.

THE SMITH-BROOKS PRINTING COMPANY, DENVER, COLO.

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IN THE

Supreme Court of the United States

NO. 110

OCTOBER TERM, 1919.

HENRY FARNCOMB, EMMA DONAHUE, HENRY LORIE, ET AL.,
Plaintiffs in Error,

VS.

THE CITY AND COUNTY OF DENVER, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

In the preparation of the original brief by defendants in error herein the discussion of a certain charter provision of the City and County of Denver was overlooked. The

charter provision referred to is Section 327 of the Charter of the City and County of Denver as amended to December 1, 1911. It is Section 95 of the Charter as revised to May 17, 1916. The section is referred to but not quoted in full at page 35, folio 70 of the transcript of record and is also referred to and quoted from in the brief of plaintiffs in error at page 7.

The plaintiffs in error in this case did not furnish the defendants in error with a copy of their brief until Saturday, the 15th day of November, 1919, and on the same day counsel for defendants in error received notice by wire from the clerk of this Court that the case would probably be reached for oral argument on the Tuesday following and in the haste to get the briefs printed before the case was reached the question we now wish to discuss was overlooked. The section of the Charter referred to and which we have not heretofore discussed is as follows:

> "Sec. 327. Or, whenever the cost of any such park site or parkway can be definitely ascertained, said bonds or any part or parts thereof may be issued and sold by the park commission, with the approval of the mayor, at not less than par, upon public advertisement for not less than ten days in some newspaper of general circulation published in the city and county of Denver, and such other newspapers as may be designated by the mayor and park commission; and the proceeds may be used exclusively by the park commission with the approval of the mayor, in the purchase or condemnation of park sites and parkways, and in any case sufficient of said bonds may be issued and sold in like manner to pay the costs of surveying,

evidencing and acquiring necessary titles, the necessary costs of court, the preparation of the assessment rolls and other incidentals. The bonds so issued shall be paid by special assessment upon all the other real estate in the district in the proportions and amounts determined by the commission and assessed by ordinance, and shall be paid only out of the moneys collected from said assessments; and all the moneys so collected shall be set apart and shall constitute a fund for the payment of said bonds and interest thereon until payment of said bonds and interest in full; provided, that before acquiring any real estate or issuing any bonds for the purposes aforesaid the commission shall prepare a map of the district and *apportion* the cost of the improvement on all the other real estate in the district *in proportion to the benefits* of each piece of real estate accruing in consequence of the establishment of such parks or parkways in said district, and *in accordance with such rules for apportioning the benefits* as to the commission may seem just and reasonable; and shall by advertisement for ten days in some newspaper of general circulation published in the city and county, give notice to the owners of the real estate to be assessed of the proposed purchase or condemnation, with a description of the lands to be acquired, the estimated cost, the number of installments and time in which the assessments will be payable, the rate of interest on unpaid installments, the rules adopted by the commission for apportioning the benefits, as aforesaid, and the time, not less than ninety days after the first publication, when the question

of the proposed purchase or condemnation will be considered by the commission; that said map and all proceedings of the commission are on file and can be seen and examined by any person interested during business hours, within said period of ninety days, at the office of the secretary of said commission, *and that all complaints and objections that may be made in writing by owners of any real estate to be assessed will be heard and determined by the commission before final action of the commission in the premises.*

The commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purposes; but if, within the time above specified a remonstrance shall be filed with the secretary of said commission, subscribed by the owners of twenty-five per cent, in area of the real estate which is to be assessed then the proposed purchase or condemnation shall not be made, and the proceedings shall not renewed for one year thereafter; and the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal. (Italics ours.)

It will be noticed, independent of Sections 299, 300 and 328 of the charter, that in so far as the *apportionment* of the taxes is concerned this Section 327 affords notice to the property owners and gives them an opportunity to be heard

before the park commission. It not only gives the property owners an opportunity to be heard but it provides that the commission shall determine the complaints and objections that may be filed pursuant to the notice before final action is taken by the commission. This section of the charter now under consideration was not involved in the previous cases decided by the Supreme Court of the State of Colorado and was not involved in the Londoner case which came to this court and was decided in 210 U. S. at page 373. The sections of the charter involved in those cases were sections 299 and 300, and the section to which we are now making reference was a section adopted since those cases were decided and affords not a substitute remedy for the property owner but a separate and additional remedy. Section 327 just quoted from, if there were no other provision in the charter providing a hearing for the property owner, would afford due process of law unless the apportionment fixed by the Board of Park Commissioners would be substantially increased after this step in the proceeding was passed. But, so far as this case is concerned and in so far as the allegations with reference thereto are concerned, there was no change made after this preliminary apportionment of the assessments by the Park Commission. Therefore, had the plaintiffs in this case availed themselves of the opportunity afforded by Section 327 and appeared before the commission that had power to hear and determine their matters they would have been afforded due process of law. The remedies of the owners provided for in the charter are cumulative. First, the owner can appear before the board and must appear before the board if he is dissatisfied with the apportionment that has been made, and the apportionment having been made by the board the property owner can also complain if the apportionment is above a legal charge on his property.

In this connection and again referring to the case of *Voight v. Detroit City*, 184 U. S. 115, 122, quoted at page 22 of our former brief where the Court said, "and it is only with the charge upon him that he is concerned, and of that alone can he complain." And in this same connection we wish also to again direct the Court's attention to the case of *Goodrich v. Detroit*, 184 U. S. 432, 438, which is quoted from at page 22 of the brief of defendants in error. If it could be objected as a matter of construction of this charter provision that the time for hearing was not specifically provided for therein, the charter provision is sufficient, following the rule laid down by this Court in *Londoner v. Denver*, 210 U. S. 373, and also in *Paulsen v. Portland*, 149 U. S. page 30, where it is held that the failure to provide in a charter provision for the time and place of notice does not of itself render the charter provision unconstitutional and that the authorities will have the implied power to give the proper notice although the same is not expressed in terms in the fundamental law. As has been before said herein, Section 327 is in no sense in conflict with Sections 299 and 300, but affords an additional ample hearing for the property owner in all of those matters that the Federal Constitution guarantees a hearing in.

A case could be imagined in which this Section 327 would not afford due process of law. Suppose that after the notice had been given, as provided in the section, hearings would be had and determinations of objections thereunder, that changes in the apportionment of cost would be made sufficient to seriously affect a particular property owner's assessment and that the assessment against him would be increased over and above that apportioned by the commission. In such case, unless a further opportunity was afforded the property owner, he might have grounds for

complaint, but in this case, the pleadings do not show, there were any changes made in any manner affecting the plaintiffs in error. The price which was paid for the acquisition of the property was much less than the estimate made by the commission. Therefore, even if a case might be imagined wherein due process of law would not be afforded such a case is not presented by the issues herein.

In *Spaulding v. Denver,* 33 Colorado, 172, 175, the Supreme Court of Colorado said:

> "No protests were made by plaintiffs against these exceptions, nor did they file any complaints or objections in response to the notice given by the clerk. No doubt, in the preliminary stages of the creation of a sewer district, the question of exemptions of property therein from bearing its legal proportion of the expense of a local public improvement could be heard and determined, but owners injuriously affected by such exemptions must move in apt time. They will not be permitted to remain silent touching the matters of which they have notice, and then, for the first time, after the improvement has been completed and the assessment made claim that the assessment is void because of matters which might have been corrected had they interposed their objection before the expense of construction was incurred."

And the Court in the same case, at page 178 of the opinion said:

> "Before parties aggrieved by an assessment levied under a fixed rule which appears to be reasonable and likely to proximate an equality of as-

sessments, can appeal to a court of equity to relieve them from an alleged excess, or because their property was not, in fact, benefited, they must at least first apply for such relief to the special tribunal which the law has provided to settle these questions. The plaintiffs never attempted to raise any of these questions before the city authorities, and are, therefore, not in a position to litigate them in a court of equity.—*City of Denver v. Dumars, supra.*"

In this case there were two forums provided by the Charter either of which could have granted relief against the objections complained of, but as no objections were filed before either forum, plaintiffs are not now in a position to seek relief in equity and claim that due process of law was not afforded.

We, therefore, again respectfully submit that the judgment of the Court below should be affirmed.

JAMES A. MARSH,
NORTON MONTGOMERY,
Attorneys for Defendants in Error.

FARNCOMB ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 110. Argued January 14, 1920.—Decided March 1, 1920.

As construed by the Supreme Court of Colorado, §§ 300 and 328 of the charter of the City and County of Denver gave property owners an opportunity to be heard before the Board of Supervisors respecting the justice and validity of local assessments for public improvements proposed by the Park Commission, and empowered the board itself to determine such complaints before the assessments were made. P. 9.

Parties who did not avail themselves of such opportunity can not be heard to complain of such assessments as unconstitutional. P. 11.

64 Colorado, 3, affirmed.

THE case is stated in the opinion.

Mr. T. J. O'Donnell, with whom *Mr. J. W. Graham* was on the briefs, for plaintiffs in error.

Mr. James A. Marsh, with whom *Mr. Norton Montgomery* was on the briefs, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought in the District Court of the City and County of Denver by the plaintiffs in error to enjoin the City from enforcing an assessment ordinance passed to raise the necessary means to pay for certain park improvements and the construction of boulevards and streets in the City of Denver.

The charter of the City of Denver was before this court in *Londoner* v. *Denver*, 210 U. S. 373. Sections 298 and 299 of the charter provide that the Board of Local Improvements shall prepare a statement showing the costs of improvements, interest, cost of collection, etc., and apportion the same upon each lot or tract of land to be assessed, shall cause the same to be certified by the president, and filed in the office of the clerk. The clerk shall then by advertisement in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed and all persons interested that said improvements have been or will be completed, and shall specify the whole cost of the improvement, and the share so apportioned to each lot, or tract of land, or person, and any complaint or objection that may be made in writing by such persons or owners to the Board of Supervisors, and filed with the clerk within sixty days from the first publication of such notice, shall be heard and determined by the Board of Supervisors at its first regular meeting after sixty days, and before the passage of any ordinance assessing the cost of the improvements.

Section 300 provides: "At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of their apportionments; the board of public

works may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the cost of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

Section 328 of the charter provides: "When the cost of any such park site or parkway is definitely determined, the park commission shall prepare, certify and file with the clerk a statement showing the cost thereof as required in Section 298 hereof; the clerk shall thereupon give the notice required by Section 299 hereof; and thereupon the same proceedings required in Section 300 hereof shall be had, except that the proceedings therein provided to be observed by the board shall be observed by the park commission; and the council shall thereupon by ordinance assess the cost against the other real estate as aforesaid, in the district, in accordance with said apportionments."

The federal question, brought before us by the writ of error, concerns the constitutionality of § 300, above set forth,—the contention being that it does not give interested property owners the opportunity to be heard where the property is to be specially assessed for making improvements of the character in question, as the hearing provided is before a board which has no power to decide any complaint which the property owner may have or make with respect to the validity or falseness of such assessment, or to correct any error in such assessment, but only has power to recommend to the power or authority, originally making the assessment, any modifications of portions of such assessment. That is that the Board of Supervisors has only the power to recommend to the Board of Park Commissioners the apportionment to be made in the assessment. It is the contention of the plaintiffs in error that the hearing thus afforded does not

give due process of law within the meaning of the Fourteenth Amendment to the Constitution. The Supreme Court of Colorado, affirming the judgment of the District Court, denied this contention, and affirmed the judgment of the District Court sustaining the validity of the assessment. 64 Colorado, 3.

The Supreme Court of Colorado held that the question had already been disposed of by its own previous decision, affirmed as to the constitutional point by our decision in *Londoner* v. *Denver*, 210 U. S., *supra*. In *Londoner* v. *Denver* the section of the charter now involved was before this court, being then § 31 of the charter. Section 300 to all intents is the same in terms as § 31, except that the Board of Supervisors, sitting as a board of equalization, is substituted for the City Council.

This court when dealing with the constitutionality of state statutes, challenged under the Fourteenth Amendment, accepts the meaning thereof as construed by the highest court of the State. *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427.

In *Londoner* v. *Denver* this court accepted, as it was bound to do, the construction of the charter made by the state court, and upon that construction determined its constitutional validity. The City Charter was construed in the Supreme Court in 33 Colorado, 104. In the opinion in that case, after discussing the steps required in making improvements of the character involved here, the court, in dealing with § 31, said (p. 117): "Notwithstanding the apparently mandatory words employed in Section 31, *supra*, we do not think that thereby the legislative power and discretion of the city council is taken away and vested in the board of public works, but that the former, in the exercise of its functions, is empowered to pass an assessing ordinance charging property with the cost of an improvement, which, according to its judgment, would be just and equitable."

7. Opinion of the Court.

Adopting this construction of the section, and considering the objection urged that it would not afford due process of law, this court, by Mr. Justice Moody, said (p. 379): "The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the charter. This may be found in the judgment under review and two cases decided with it. *Denver* v. *Kennedy*, 33 Colorado, 80; *Denver* v. *Dumars*, 33 Colorado, 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by § 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant,' 33 Colorado, 97; and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself therefore is clear of all constitutional faults."

Plaintiffs in error did not avail themselves of the privilege of a hearing as provided by this section, but after the assessing ordinance had been passed began this proceeding in the District Court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our decision; that matter was within the

sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported in 33 Colorado, and by our decision based upon that construction in *Londoner* v. *Denver*, 210 U. S., *supra*. As the plaintiffs in error had an opportunity to be heard before the board duly constituted by § 300, they cannot be heard to complain now. It follows that the judgment of the Supreme Court of Colorado must be

Affirmed.

GOLDSMITH ET AL. v. GEORGE C. PRENTICE